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FEDERAL COMMUNICATIONS COMMISSION

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F.C.C. 72-1181

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re
AUDIO VISUAL COVERAGE OF AGENCY PROCEEDINGS

JANUARY 23, 1973.

THE COMMISSION BY COMMISSIONERS BURCH (CHAIRMAN), ROBERT E. LEE, JOHNSON, H. REX LEE, REID AND HOOKS, WITH COMMISSIONER WILEY CONCURRING IN PART AND DISSENTING IN PART AND ISSUING A STATEMENT IN WHICH CHAIRMAN BURCH AND COMMISSIONER REID JOINED, ISSUED THE FOLLOWING PUBLIC NOTICE.

AUDIO/VISUAL COVERAGE OF AGENCY PROCEEDINGS

The Commission has been requested by the Administrative Conference of the United States, in accordance with its *Recommendation 32: Broadcast of Agency Proceedings*, adopted June 8, 1972, to give consideration to the implementation of this Recommendation, by establishing a policy in this area and to encourage audio/visual coverage of proceedings involving issues of broad public interest, subject to appropriate limitations and controls.

The Commission agrees with the Conference that there is a need to inform the public concerning administrative proceedings, particularly those of broad social or economic impact, and to encourage participation in and understanding of the administrative process. Although the Commission has not heretofore had a specific regulation or a formally-adopted Commission policy governing the audio/visual coverage of adjudicatory and rule-making proceedings, it has, by actual experience over a number of years, largely accomplished the objectives and purposes of Recommendation 32. However, in light of the ever-increasing interest by the public in Commission proceedings, it has been determined that a formal statement of Commission policy in this regard should be issued. Accordingly, the Commission adopts the following statement of general guidelines for presiding officers, the industry and the public concerning requests for audio and/or visual coverage of Commission proceedings:

A. *Governing Policy*

1. The Commission agrees in principle with the objectives and purposes of *Recommendation 32: Broadcast of Agency Proceedings*, adopted by the Administrative Conference of the United States.

2. Audio and/or visual (i.e. video or film) coverage of many Commission proceedings would be of interest to the public and would enhance public understanding of Commission proceedings. Such coverage should therefore be encouraged subject to appropriate controls and limitations.

109-027—73——1

3. Determinations as to whether audio and/or visual coverage of Commission proceedings should be allowed and, if so, the nature and extent of such coverage, shall be within the sound discretion of the presiding officer.

B. *Types of Proceedings*

1. Audio and/or visual coverage of the following types of proceedings is encouraged: (1) Notice and comment rule making proceedings, where an opportunity is afforded to make a public oral presentation; (2) On-the-record formal rule making proceedings; (3) investigatory proceedings where public oral presentations are made on the record to the Commission *en banc* or to a presiding officer, except as limited in paragraph 2 of this Section; and (4) adjudicatory proceedings, except as limited in paragraph 2 of this Section.

2. Audio and/or visual coverage should be excluded in adjudicatory and investigatory proceedings which involve primarily matters of past culpable conduct of an individual and which do not have a substantial and direct impact upon service to the public, if the person in question objects to such coverage.

C. *Prevention of Disruption*

Audio and/or visual coverage of Commission proceedings shall be conducted with minimal intrusion upon the normal course of the proceeding. Requests for such coverage shall be made reasonably in advance of the commencement of the hearing or hearing session sought to be covered. The presiding officer may impose reasonable restrictions on the use of audio and/or visual equipment, so as to maintain the dignity and decorum of the proceeding, and to avoid undue interference with the proper conduct of the hearing. The presiding officer may, in the exercise of his discretion to allow, exclude or restrict coverage of the proceeding, take into consideration the distinctive characteristics of the medium of audio/visual coverage requested—i.e. video (live broadcast or tape-delayed); audio (live broadcast or tape recorded for later broadcast); audio or visual recording for broadcast in its entirety or in edited version; motion picture or still photo coverage; etc.

D. *Protection of Witnesses*

In any adjudicatory or public investigatory proceeding, a witness shall have the right, by stating his request to the presiding officer at any point prior to or during his testimony, to exclude audio and/or visual coverage of his testimony.

E. *Rulings of Presiding Officers*

If a request for audio and/or visual coverage of a proceeding or a particular portion thereof is rejected or restricted by the presiding officer, the reasons therefor shall be stated on the record of the proceeding, either by a formal order issued by the presiding officer or by an oral ruling on the record. Appeals from such rulings will not be permitted.

The foregoing policy statement shall be applicable to all pending proceedings, as of January 30, 1973.

STATEMENT OF COMMISSIONER WILEY CONCURRING IN PART AND DISSENTING IN PART IN WHICH CHAIRMAN BURCH AND COMMISSIONER REID JOIN

I fully endorse our adoption of a policy to encourage and facilitate the broadcasting of Commission rule making and investigatory proceedings. The broadcast media have demonstrated that they possess both the technical sophistication and journalistic maturity which will permit the coverage of such issue-oriented events to be a profound public service.

However, I depart from the views of the majority in similarly encouraging, with minor exception, the radio and television coverage of adjudicatory proceedings. Adjudicatory matters, unlike those involved in rule making, are in the nature of trials and center on the rights of individual litigants. I am frankly concerned that, in the

interest of advancing public exposure of governmental processes, we may be unnecessarily infringing on individual freedom and individual privacy. In my opinion, the presence of lights, cameras and microphones may be inconsistent with the dignity, solemnity and proper focus of an adjudicatory proceeding. As Dean Griswold so eloquently expressed it some years ago:

> A courtroom is not a stage; and witnesses and lawyers, and judges and juries and parties, are not players. A trial is not a drama, and it is not held for public delectation or even public information. It is held for the solemn purpose of endeavoring to ascertain the truth; and very careful safeguards have been devised out of the experience of many years to facilitate that process. It can hardly be denied that if this process is broadcast or televised, it will be distorted.[1]

The Supreme Court has also spoken on the matter of televised trials, at least with respect to those which are "notorious". *Estes* v. *Texas*, 381 U.S. 532 (1965). In his concurring statement, Chief Justice Warren concluded that allowing criminal trials to be televised to the public at large violated the Sixth Amendment for federal courts and the Fourteenth Amendment for state courts because it diverts the trial from its proper purpose, the search for truth, and inevitably has an impact on all trial participants; because it gives the public the wrong impression about the purpose of trials and lessens the reliability of such proceedings; and because it singles out certain defendants by subjecting them to a proceeding under prejudicial conditions not experienced by others (*Id.* at 565). The Chief Justice's conclusions on this matter warrant careful consideration. Moreover, while recognizing the importance of a "public trial", I would suggest that such a right belongs to the accused and not to the public (*Id.* at 588, Harlan, J., concurring opinion).

Thus, to whatever extent adjudicatory proceedings before this administrative agency may resemble a trial, I would be extremely reluctant to ignore the sound advice contained in the foregoing precedents. Specifically, I would delete that language in Part B(2) of the Commission's policy which expressly encourages audio and/or visual coverage of adjudicatory proceedings. In this connection, I must also voice my disappointment with the majority's unseemly haste in adopting such an important policy matter without full and considered deliberation on the merits of alternative language which I attempted to propose. In my opinion, such haste in the formulation of policy demeans the administrative process.

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[1] Erwin N. Griswold, "The Standards of the Legal Profession: Canon 35 Should Not Be Surrendered", *American Bar Association Journal*, Vol. 48 p. 616.

F.C.C. 73R-66

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of JOHN L. BREECE, SIOUX CITY, IOWA	Docket No. 19633 File No. BPH-7840
JIM AND TOM HASSENGER BROADCASTING CO., SIOUX CITY, IOWA For Construction Permits	Docket No. 19634 File No. BPH-7861

MEMORANDUM OPINION AND ORDER

(Adopted February 5, 1973; Released February 8, 1973)

BY THE REVIEW BOARD.

1. Jim and Tom Hassenger Broadcasting Company gave notice of the filing of its application in the *Daily Reporter*, published daily in Sioux City by the Credit Bureau of that city. The daily circulation of that paper is less than 500 and the news consists of court and commercial items. In 1930, the Supreme Court of Iowa ruled that the *Daily Reporter* was a newspaper of general circulation under certain Iowa statutes.[1] In view of this ruling, even though it is not binding on the Commission, the Board is unable to agree with John L. Breece whose petition to enlarge issues is pending before us,[2] that Hassenger attempted to mislead the Commission when it failed "to notify the Commission that it had not advertised in a daily paper of general circulation" as required by Section 1.580(c) of the Commission's Rules.[3] Therefore, the petition will be denied. However, the purpose of Section 311(a)(1) of the Communications Act and Section 1.580(c) of the rules is not well served when a newspaper of limited circulation is used for publication in preference to one with a wide distribution to the general public, and were it not for the above-cited court opinion, the Board would be disposed to enlarge the issues.

2. Accordingly, IT IS ORDERED, That the petition to enlarge issues, filed December 13, 1972, by John L. Breece, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[1] *Burak* v. *Ditson*, 229 N.W. 227.

[2] Breece's petition was filed December 13, 1972. Petitioner filed a supplement on December 18, 1972; Hassenger filed an opposition on December 19, 1972; and on December 29, 1972, the Broadcast Bureau filed its comments.

[3] It is noted that on January 11, 1973, the Administrative Law Judge released a Memorandum Opinion and Order refusing to dismiss the Hassenger application on the grounds it had failed to publish in accordance with the Rules. (FCC 73M-39.)

F.C.C. 73-80

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 74, SUBPART K, OF THE COMMISSION'S RULES AND REGULATIONS RELATIVE TO COMMUNITY ANTENNA TELEVISION SYSTEMS; AND INQUIRY INTO THE DEVELOPMENT OF COMMUNICATIONS TECHNOLOGY AND SERVICES TO FORMULATE REGULATORY POLICY AND RULEMAKING AND/OR LEGISLATIVE PROPOSALS	Docket No. 18397

MEMORANDUM OPINION AND ORDER

(Adopted January 17, 1973; Released January 31, 1973)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE, JOHNSON AND HOOKS DISSENTING AND ISSUING STATEMENTS; COMMISSIONERS REID AND WILEY CONCURRING AND ISSUING STATEMENTS.

1. On June 24, 1970, we adopted the *Second Report and Order in Docket No. 18397*, 23 FCC 2d 816, in which we adopted Section 74.-1131—now Section 76.501—of our cable television rules. Petitions for reconsideration and other pleadings have been filed, and we now address the objections.

2. Petitions and informal requests for reconsideration of the *Second Report* were received, during the regular filing period, from—

American Broadcasting Company ("ABC");
Central California Communications Corporation ("CCCC");
Carter Publications, Inc.;
Columbus Cablevision, Inc.;
Fetzer Broadcasting Company;
Gill Industries;
Gross Telecasting, Inc.;
Hazard Television Company, Inc.;
King Broadcasting Company;
Liberty Television, Inc.;
McClatchy Newspapers;
Midcontinent Broadcasting Company;
Monroe Cablevision, Inc.;
Morris, Lloyd P.;
National Association of Broadcasters ("NAB");
National Association of Educational Broadcasters ("NAEB");
National Broadcasting Company, Inc. ("NBC");
Newhouse Broadcasting Corporation;
Post Company;

Stauffer Publications, Inc., and Tribune Publishing Co., filing jointly ("Stauffer");
Susquehanna Broadcasting Corporation;
Triangle Broadcasting Corporation; and
Vincennes University.

Subsequently, late-tendered pleadings were received from Connecticut Television, Inc. ("CTI"), and Broadcast-Plaza, Inc. ("BPI"), and supplementary pleadings were tendered by Columbus, Fetzer, Liberty, NAB, NAEB, Newhouse, and Stauffer. All of these are accepted for filing, and, in addition we have considered, in this context, a related rule making petition by Roanoke Telecasting Corporation.

SUMMARY OF PLEADINGS

3. The respondents variously request that the Commission: (1) rescind Section 76.501 entirely, or with particular respect to television networks or stations (all stations, or UHF or educational stations), either permanently or pending further study;[1] (2) postpone the effective date of the rule; (3) rescind or modify the divestiture requirements, or lengthen the three-year divestiture period, or articulate standards for case-by-case waiver of the rule; or (4) with respect to station-system cross-relationships, substitute some other measure (geographic, economic, audience size, et al.) of co-location for the present predicted-Grade-B-contour standard; or (5) expressly preempt the subject of cross-ownership, to prevent States and local governments from adopting standards more stringent than those adopted by the Commission.

4. *Full rescission of Section 76.501* is urged by CCCC, Columbus, Fetzer, Gill, Monroe, NAB, and Newhouse. Monroe and Newhouse contend that, as a matter of law (Section 4 of the Administrative Procedure Act, 5 USC 553(c)) and policy, the record on which the Commission relied in adopting Section 76.501 was inadequate, in that the rule is justified in the *Second Report* primarily on the basis of theories and speculations unsupported by facts, and that the facts cited in that document are irrelevant. Specifically, Newhouse contends that the statement therein that 46% of the cable systems started in 1966 were "owned by radio or television stations" is irrelevant because it (i) doesn't indicate what percentage was owned by television stations, and (ii) indicates no trend toward domination of cable by broadcasters when considered together with the fact that, as of the date of issuance of the *Second Report*, fewer than 400,000 cable subscribers were served by systems within the Grade B contours of co-owned television stations. Moreover, Newhouse argues, the Commission, having made no determination as to what constitutes adequate communications media competition, cannot properly evaluate the need for remedial, or even preventative, action.

5. NAB cites the "Seiden Report" ("Mass Communications in the United States," filed in Docket No. 18110 in January 1972, six months after adoption of the *Second Report* herein) as proof that "there is a very large diversity of media available to the public, in virtually

[1] Or let UHF stations hold noncontrolling interests in co-located cable systems.

every market regardless of size," to such extent that (apart from unique situations which could be dealt with on an ad hoc basis) "co-located cable television cross-ownership could not and would not significantly affect it." Newhouse and Fetzer cite data regarding some specific cable localities as evidence that adequate media competition exists.

6. Newhouse contends that, if broadcasters are excluded from cable system operation, other large corporations will move in without the broadcasters' record of public service, and it suggests that certain multiple-system operators favor Section 76.501 because it "enabl[es] them to increase their share of the CATV market by eliminating a strong source of competition for local markets." In response to the argument that cable-broadcast cross-ownerships of the sorts dealt with in Section 76.501 would encourage subordination of local-interest cablecasting to more profitable broadcast operations, Newhouse cites the voluntary importation of non-Newhouse TV broadcast signals by a Newhouse system within the Grade B contour of a co-owned television station.

7. Cross-ownership doesn't conflict with the Commission's "many voices" objective, Newhouse contends, since: (1) a cable system brings so many additional "voices" to the television set that any offsetting effects of local-cross ownership become insignificant; (2) a cable system conducting origination cablecasting will presumably focus on *very* local news and public service programming, something a TV broadcaster cannot do, and so station and system programming will not reinforce each other but rather concentrate on different subjects; and (3) cable systems can be (and, Gill notes, under the 1972 cable rules, in many cases are) required to provide access channels for programming not under the system operator's control. Newhouse, Columbus, and NAB assert that the Commission's primary basis for adoption of Section 76.501 was the expectation that cable systems would originate cablecast programming to a significant extent in compliance with the program-origination rule (now Section 76.201(a)), and claim that that basis has been invalidated by the Commission's stay-of-implementation of the program-origination requirement.[2]

8. The Commission's contention, in footnote 2 of the *Second Report*, that "Diversification rules would be desirable even if CATV operations were limited to carriage of broadcast signals and common carrier activities, in view of the limited number of broadcast and newspaper media in all communities, and the potential importance of cable facilities in providing many communications services," is disputed by Newhouse and Columbus on the ground that it "represents an arbitrary assumption of antitrust jurisdiction using patently wrong antitrust theories," since (1) cable and broadcasting are different industries in separate markets, and (2) there is an ample supply of media voices. Moreover, Newhouse argues, the future shape of cable television cannot be foreseen with certainty, and regulatory policies should not be based upon speculative prediction.

[2] The stay was ordered by the Commission after the U.S. Court of Appeals, Eighth Circuit, declared the program-origination requirement null and void. *Midwest Video Corp.* v. *U.S.*, 441 F. 2d 1322 (1971). Subsequently, the Supreme Court reversed that Eighth Circuit decision (406 U.S. 649 (1972)), but the Commission has not yet acted to terminate the stay.

9. NAB contends that, as a result of our adoption of the *Cable Television Report and Order in Docket No. 18397* (37 Fed. Reg. 3251, February 12, 1972), enough is now known about the future shape of cable to warrant rescission of Section 76.501. Specifically, NAB says, under the new rules: (1) the TV broadcast signal carriage by cable systems is now predetermined more than ever by detailed rules, and hence the cable operator is, for the most part, unable to favor a co-owned local television station (or disadvantage a competing local TV station) by his distant-signal-carriage choices; and (2) the emphasis is now on access rather than origination cablecasting (with the cable operator rewired in the top 100 markets to provide at least three access channels beyond his programming control).

10. Newhouse contends that the provisions of Section 76.501 lie beyond the Commission's statutory authority. It argues that nothing in the Communications Act prohibits a broadcast licensee from engaging in any proper type of business; cites a judicial decision for the proposition that the Commission lacks statutory authority to adopt a rule barring newspaper publishers from broadcast station ownership; and from that infers that the Section 76.501 ban on television-cable cross-ownership also exceeds the Commission's statutory authority. Newhouse further argues that the Commission's power to regulate cable is limited to that reasonably ancillary to regulation of broadcasting, and questions whether cable system ownership may be included under that rubric.

11. *Rescission of Section 76.501(a)(1), regarding cross ownership et al. of cable systems with national television networks*, is urged by two of the three national TV broadcast networks, ABC and NBC. In support of this request, they argue that: (1) Absent evidence of illegality or wrongdoing, adoption of the network cross-ownership ban is unfair to the networks and contrary to legal tradition in that (i) without good cause it bars an industry from experimenting with or adopting a new technology in developments related to its normal function of program distribution, and (ii) it is unheard of in American law (under such circumstances) to impose per se disqualifications from future business interests and require divestiture of a business lawfully acquired or engaged in (NBC). (2) The Commission's *Notice . . . in Docket No. 18397* did not inform parties that the question of network ownership of cable systems would be decided, and thus the rule making "notice" requirements in the Administrative Procedure Act have not been met; although some respondents to the notice commented on the network question, only one month (April 3–May 12, 1969) was allowed for reply comment; and the question of TV broadcast network cross-ownership with cable systems is a major one which warrants full investigation and full opportunity for comment (ABC). (3) The Commission's fear that television network ownership of cable systems might inhibit cable development is contradicted by the fact that the television industry itself was developed to a large degree by radio broadcast licensees and networks, and newspaper and theatre owners (ABC, NBC). And (4) the prohibition against network ownership of cable systems is premature, and could hamper cable growth, since (i) only a few cable subscribers are served by network-owned systems (ABC, NBC); (ii) cable television is at too early a stage of

development, and its expansion and innovation needs and risks are too great for the Commission to deny ownership to those whose natural interest and communications innovation history may be the greatest; (iii) exclusion of TV network investment in cable systems will be without any justification if cable systems become essentially common carriers as a result of the Commission's rule making decisions designed to promote program diversity; and (iv) there is no problem of overconcentration of network ownership in cable television now, and there will be time enough to deal with the problem, if it is one, when the Commission knows what the role of cable is to be (ABC).

12. *Rescission of Section 76.501(a)(2), regarding cross ownership et al. of cable systems with co-located television broadcast stations*, is urged specifically by BPI, Carter, Columbus, CTI, Gill, McClatchy, and Midcontinent; and implicitly by Fetzer, Hazard, Liberty, and Monroe. Monroe objects to the local station-system cross-ownership ban on the ground that it prevents station licensees, who receive no compensation from cable systems for television broadcast carriage, from at least getting indirect compensation via ownership of cable systems in their own areas. Monroe further contends that the station-system cross-ownership ban reverses the Commission position expressed in Docket No. 15415; that the Commission's rationale for that reversal (i.e., that its previous view had not taken local cable casting and other potential nonbroadcast communications services by cable systems) since, during the pendency of Docket No. 15415, the Commission could not have been unaware of these potentialities; and that the Commission's attempt, via Section 76.501(a)(2), to foster competition between cable systems and co-located TV stations, is inconsistent with its claim of jurisdiction over cable on the ground that cable regulation is necessary to protect TV stations from cable system competition.

13. CTI contends that the station-system cross-ownership ban is insufficiently supported in the record because it is based not on allegations or evidence of any existing pattern of abuse, but rather on unjustified fear of potential anticompetitive abuse and unwarranted expectations that cable would play a pivotal role as an opinion molder; Liberty notes that the *Second Report* contains no findings regarding the degree of *local* cross-ownership in the United States; and Gill notes that no showing was made of any abuses in system operators' control of origination cablecast channels. McClatchy states that, as of January 1, 1970, fewer than 150 operating cable systems, serving 380,000 subscribers (6% of the number of systems, and 8.4% of the number of subscribers, at that time) were owned by parties with an interest in a co-located system, and that these 380,000 subscribers constituted only 0.6% of the then 62,213,900 TV homes in the United States; and concludes, in the light of these figures, that the alleged problem is deminimis. CTI contends that the station-system local-cross-ownership ban reflects a mere mechanical transference of existing broadcast principles to the emerging cable industry, as evidenced, it says, by the across-the-board application of the ban to UHF and VHF stations, commercial and noncommercial stations, and majority and minority interests, all without regard to the number and kinds of communications media serving a particular area. Such

"mechanical transference" is inappropriate, CTI says, because of the "fundamental technical and competitive distinctions between broadcasting and cable communications."

14. Such alleged "mechanical transference" is particularly inappropriate, CTI argues, in the light of developments subsequent to the issuance of the *Second Report*. In particular, CTI contends, it is becoming increasingly unlikely that cable operators will play a significant role in the influencing of opinion. Rather, it asserts, there is a growing probability that cable operators will have little control over their systems' nonbroadcast programming, and that even major systems may not be required to originate cablecast programming at all. This last point raises an important threshold question, CTI says, in that the Commission's adoption of Section 76.501 was strongly influenced by the expectation that most major cable systems would be under a regulatory obligation to act as significant programming media. Monroe asserts that, in any event, cable operators have no interest in opinion influencing, and that their cable origination would affect public opinion mainly by providing access to multiple voices in the community. Gill comments that a cable system's ability to influence its subscribers' opinions is restricted by, inter alia, the existence of competing media, the limited amount of cable origination (as a result of cost considerations), and the application of "political broadcast" and "fairness doctrine" rules to origination cablecasting. BPI urges the Commission to permit TV broadcasters to take part in the development of co-located systems, both because doing so would be consistent with the Commission's desire to foster cable growth in the nation's largest market areas and because it would benefit viewers for television broadcasters who know their own areas' needs and interests, and who know how to do programming, to have a role in local cable development.

15. *Exemption of UHF television stations from the scope of Section 76.501(a)(2)* is favored by CTI and Roanoke [3] and opposed by BPI. In support of an exemption for UHF stations, CTI states that: (1) over the years, the Commission and Congress have adopted several measures to foster UHF in view of the technical and competitive disparities between UHF and VHF television, and the courts have regularly viewed such actions as valid exercises of Commission and Congressional discretion; (2) but UHF and VHF are still far from competitive equals and there is continuing a need to foster UHF development; and (3) exemption of UHF television stations from the purview of Section 76.501(a)(2) would materially foster the development of UHF television and would be fully consistent with regulatory policies previously adopted for that purpose. (As alternatives, if necessary, to full exemption of UHF stations from the local-cross-ownership ban, CTI urges that Section 76.501(a)(2) be amended to permit a financially marginal UHF station to hold a minority interest in a co-located cable system, and to provide that UHF station-cable system cross-ownerships shall be dealt with on a case-by-case basis.) Roanoke urges the Commission to allow UHF stations to have ownership

[3] Also, in July 1972, the All-Channel Television Society filed a rule making petition requesting amendment of Section 76.501 to permit a UHF station to hold an ownership interest in a co-located cable system.

interests in co-located cable systems on the grounds that (4) a UHF station with an ownership interest in a co-located cable system can supply it with program origination facilities and expertise, and, (5) if the cable system is successful, it can bring added revenues to a financially straitened UHF station which has an interest in it.

16. BPI, on the other hand, contends that a special exemption for UHF stations would be unsound because: (1) It would confer an undue competitive advantage upon certain UHF stations (e.g., profitable network-affiliated stations in such top-50 markets as Hartford-New Haven, which is served by only two VHF stations). (2) Even in the case of marginal UHF stations, it is not clear that cable system local cross-ownership would improve the UHF station's financial condition or public service compatibility; indeed it is equally likely that the cable system adjunct would be a drain on the UHF station's resources. (3) An exemption predicated on the plight of struggling UHF stations would in no way further the Commission's cable television objectives, and should therefore not be allowed. BPI argues that: (i) The case for relaxing the cross-ownership ban rests largely on the contribution that broadcasters can make to the development of cable in their service areas. (ii) Judged in that light, a rule which would permit the class of TV stations with the least to contribute to enter cable business locally, but which would preclude entry by those TV licensees with the most to contribute, is hardly calculated to maximize the benefits of cable service to the public. (iii) To the extent that UHF stations *are* in a position to provide such assistance to cable television in an ownership capacity, they stand on no different footing than profitable VHF stations, and there is no reason why such UHF stations should be accorded preferential treatment.

17. *Exemption of educational television stations from the scope of Section 76.501(a)(2)* is urged by NAEB, Vincennes University,[4] and an individual educator, Mr. Lloyd P. Morris, of Elmwood Park, Illinois. Their arguments are analogous in many respects to those contained in comments on the subject filed in response to the *Notice of Proposed Rule Making and of Inquiry in Docket No. 18891*, (35 F.R. 11042, July 9, 1970) pursuant to footnote 1 of that document. NAEB asserts, first, that the original *Notice . . . in Docket No. 18397* did not discuss the need for or desirability of a prohibition against educational television station-cable system local cross-ownerships, and that the *Second Report* sets forth no reasons for such a prohibition. However, NAEB continues, it is clear that the thrust of the Commission's comments and attention, with respect to TV station-cable system, concerned *commercial* stations. Second, NAEB cites the Commission's acknowledgment (in footnote 1 of our *Notice . . . in Docket No. 18891*) that cross-ownership with a cable system may be financially beneficial to an ETV station. These financial opportunities alone warrant deletion of the present ETV-cable local-cross-ownership ban, NAEB urges, because "most of the difficulties confronting educational television stations are directly traceable to the lack of adequate funding. . . ." In response to the Commission's observation that other potential sources of funds are available to ETV stations, NAEB

[4] Licensee of ETV Station WVUT, Vincennes, Indiana, and operator of cable systems at Vincennes and Washington, Indiana, and Bridgeport and Lawrenceville, Illinois.

replies that the operation of a local cable system would (i) be directly available to a local ETV station, (ii) be based on its own industry and initiative, and (iii) avoid the "oftentimes tortuous delays involved in securing funds from more traditional sources." Third, NAEB argues, ETV stations, as owners of cable systems, would make good use of cable's potentialities for educational and public service programming, in that: (i) they would make full use of the cable's broadband and two-way capabilities; (ii) they could coordinate the programming activities of the ETV station and the cable system so that (*a*) imported signals would not have an adverse effect on the ETV station's offerings, and (*b*) distant ETV signals could supplement local ETV station offerings but harmful duplication would be avoided; and (iii) ETV stations have good knowledge of local tastes, needs, and desires by virtue of their deep and broad-ranged roots in the community. Fourth, Vincennes notes that the Commission used a "multiple voices" argument in support of its adoption of both Section 76.501(a)(2) and recent amendments to the broadcast multiple-ownership rules (in the *First Report and Order in Docket No. 18110*, 22 FCC 2d 306, released April 6, 1970), but that it specifically excluded ETV stations from the applicability of the Docket No. 18110 amendments. (Also, some of the comments filed in Docket No. 18891 argue that the "multiple voices" argument does not properly apply to ETV stations because, in the typical case, ETV station governing boards memberships have been deliberately chosen to represent a broad range of community interests.)

18. *A stay of implementation of Section 76.501* is urged by Gill, Hazard, NAB, and Triangle. Gill, Hazard, and Triangle contend that it is unfair to single out TV broadcast-cable cross-ownership for early disposition because the Commission cannot logically isolate the questions pertaining to such cross-ownerships from the questions pertaining to cross-ownerships of cable systems with other mass-communications-media entities. The NAB urged deferral of the effective date of Section 76.501 until the true nature of cable is clarified and until pertinent questions raised in the Commission's broadcast-multiple-ownership docket (No. 18110) are clarified.

19. *Rescission or modification of the divestiture requirement:* Most of the petitioners urge (1) rescission of the divestiture requirement of Section 76.501, either (i) totally, or insofar as that requirement applies to (ii) networks or (iii) television stations; (2) extension of the present three-year divestiture grace period; or (3) enunciation of appropriate standards for (i) general exceptions to, or (ii) case-by-case waivers of, the divestiture requirement.

20. *Rescission:* NAB, urging total rescission of the divestiture requirement, cites a series of Commission actions which, in NAB's view, encouraged a number of broadcasters to enter the cable television field in the mistaken belief that subsequent divestiture would not be required. In the light of that history, NAB believes, the imposition of a divestiture requirement constitutes "a lack of elemental fairness." NBC criticizes the divestiture requirement, insofar as it applies to the networks, as unfair, invalid, and contrary to the public interest in view of an absence of findings of wrongdoing, illegality, or monopoly,

and failure to consider the networks' contributions to cable television during cable's experimental period.

21. *Re co-located television stations:* Several of the petitioners (CCCC, Carter, Columbus, CTI, Fetzer, Gill, Liberty, McClatchy, Midcontinent, Newhouse, NAB, Post, and Stauffer) urge rescission of the divestiture requirement insofar as it applies to co-located television broadcast stations. In support of such rescission it is argued that (i) procedural requirements have been violated; (ii) Commission precedent has been ignored; (iii) the divestiture requirement is injurious to present owners; (iv) the record is insufficient to justify the requirement; (v) mandatory divestiture is an extreme and unlawfully harsh remedy; (vi) it is discriminatorily ill-timed; and (vii) this timing forces cable operators to make "gambling" decisions regarding divestitures.

22. The procedural requirements of Section 316(a) of the Communications Act were violated in the adoption of the mandatory-divestiture requirement, according to Columbus, McClatchy, Midcontinent, and Newhouse. They argue that: (1) The Commission asserts, in paragraphs 17 and 18 of the *Second Report*, that, in banning certain cross-ownerships with cable systems, it is exercising a licensing function with respect to cable; but (2) Section 316(a) prohibits modification of "Any station license . . . by the Commission . . . until the holder of the license . . . [has] been given reasonable opportunity to show cause why such order of modification should not issue, and Section 316(b) provides that the burdens of proof and of proceeding with the introduction of evidence are on the Commission; and yet (3) cable operators with interests in co-located television stations have been afforded an opportunity for a public hearing. Although (4) it is conceded that the Commission through rule making change the *operating* requirements of existing licensees (*California Citizens Ass'n* v. *U.S.*, 375 F 2d 43 (9th Cir. 1967), (5) that does not mean that the Commission may use the rule making to negate the provisions of Section 316(a) (id., p. 51), e.g., by the adoption of a rule which is (as in the case of the mandatory-divestiture provisions of Section 76.501) individual in impact and condemnatory in purpose. (6) The divestiture provision modifies the existing license of certain television stations by conditioning the continuance of that license upon their divestiture of co-located cross-owned cable systems. (7) The individual-impact character of this is heightened by the fact that only 400,000 homes, fewer than 0.07 percent of all TV homes, are served by cable systems within the predicted Grade B contours of co-owned TV stations.

23. The divestiture requirement is contrary to Commission precedent, argued Columbus, Fetzer, McClatchy, Newhouse, and Stauffer; and (Fetzer adds) it is particularly harsh treatment of broadcasters who had been led to expect otherwise, acted in reasonable reliance thereon, and are now threatened as a result with great financial loss.

24. NAB urges the Commission to "grandfather" local cross-ownerships in being prior to the adoption of Section 76.501 on the ground that the economic losses and uncertainties resulting from the divestiture requirement are of a far higher magnitude than damage caused by a prospective application of the rule. Several of the petitioners

(CCCC, Carter, Columbus, Gill, Newhouse, and Post) cite the impact of the divestiture requirement on their own business operations as examples of the injury broadcasters with local cable interests. They refer to the long lead-time between capital investment and fully profitable operation, and the unlikelihood of recovering their investments in disposing of cable systems which have not matured to the point of fully demonstrating their potential profitability. They express little confidence in the Commission's hope that broadcasters will be able to negotiate exchanges of cable systems with broadcasters in other areas.

25. Petitioners contending that the evidence in the record is insufficient to warrant mandatory divestiture of cross-relationships between co-located cable systems and television systems state essentially the following: (1) The record includes no evidence of abuses of existing such cross-ownerships; nor is there any evidence of anticompetitive effects of existing cross-ownership situations, or of a reduction in the number of opinion-influencing voices available to people in communities served by cable systems within the Grade A or B contour of a jointly owned television station. Moreover, cable systems will have "access" channels over which diverse opinions may be expressed without the control of the cable operator (Columbus, McClatchy, Midcontinent, Newhouse). (2) The Commission adopted the cross-ownership ban on the basis of its "expertise" and in the light of its new requirement of program origination (id.). However, "expertise" is not an adequate basis for requiring divestiture of investments made in reliance upon previous Commission policies (Midcontinent), and the Commission's hope that it may foster program origination by means of the divestiture requirement is purely speculative since (i) most cable systems (whether station-owned or not) do not engage in program origination, and (ii) the program-origination rule provides no standard as to the types and amount of origination required (Fetzer). (3) The lack of record evidence supporting divestiture is all the more glaring when compared with the Commission's approach in adopting rules restricting broadcast-ownership combinations: (i) The broadcast duopoly policy gradually developed case by case. (ii) The chain-broadcast rules were adopted following a six-year process, including extensive hearings before a five-member special committee (Columbus, McClatchy, Midcontinent, Newhouse). (iii) In the present proceeding, the Commission did not give affected parties a reasonable opportunity to supply data, unlike broadcast Docket No. 18110, in which the Commission gave parties six months additional time for filing of comments (Stauffer). (4) The Commission made no effort to demonstrate that the alleged problem is not de minimis. It fails to ascertain and show (i) the extent of broadcast-cable cross-ownership, and (ii) the impact of the *Second Report* within Grade B contours of cross-owned stations (it has given no indication whether the new cross-ownership prohibition will affect 10% or 90% of the cable systems and/or subscribers in the United States. In contrast, in Docket No. 18110, the Commission published an exhaustive abstract, "Newspaper-Broadcast Joint Interests as of November 1, 1969". (Id.) (5) In fact, the available data (see paragraph 13 supra) indicates that the "problem" is, at most, de minimis (id.).

26. But, even assuming the existence of a problem, several petitioners argue, mandatory divestiture is a harsh remedy which is unwarranted where, as here, lesser remedies would do. In *Timken Roller Bearing Co.*, v. *U.S.*, 341 US 593, 603 (1951), they note, the U.S. Supreme Court ruled that "divestiture . . . is not to be used . . . without regard to the type of violation or whether other effective remedies, less harsh, are available". How, they ask, can the Commission impose mandatory divestiture upon cable operators who are innocent of misconduct in light of the Supreme Court's indication in *Timken* that it would not require divestiture in most cases in which actual wrongdoing was shown? They suggest, as less drastic measures sufficient to serve the Commission's purposes: (1) application of the broadcast "fairness doctrine" and "political election" rules to cablecasting; (2) mandatory operation of a "common-carrier" cablecast channel; and (3) reliance upon prospective application of the cross-ownership ban, since future sales of stations and systems would gradually eliminate "grandfathered" cross-ownerships. (CCCC, Columbus, Fetzer, McClatchy, Midcontinent, Newhouse, and Stauffer.)

27. Finally, petitioners contend that the divestiture requirement is discriminatorily ill-timed in that (i) the Commission "prematurely" ordered a break-up of the "most insignificant" of the media combinations, cable-broadcast, just after postponing action on other cross-ownership proposals in Docket No. 18110 to permit further study (McClatchy and Midcontinent); and (ii) it is inconsistent and unfair to require the licensee of a TV station in a community to dispose of his interest in a cable system there while permitting the owner of a newspaper and AM and FM stations in that community to acquire a cable system there (Gill). Gill also argues that this non-simultaneity of Commission action on the various cable cross-ownership questions unreasonably compels an entrepreneur with cable, TV, and AM and FM radio interests in the same area to gamble in deciding whether to divest himself of his TV station or the cable system—in that subsequent Commission rule making decisions may force him to divest himself of more of these interests than he would have had to if he could have anticipated those later decisions.

28. *Modification of the divestiture requirement:* CCCC notes that the Commission has mentioned the possibility of divestiture-requirement waivers, but has not generally articulated its criteria for grant of such waivers; and it urges the Commission to reduce the time and expense involved in the waiver process by public announcement of specified waiver criteria. Gill urges a stay of the divestiture requirement in view of the little time remaining of the originally specified three-year divestiture period, and the Commission's inaction to date on petitions for reconsideration. Without such a stay, Gill argues, "a cross-owner must soon determine which of his properties he will divest, and diligently seek a buyer, notwithstanding his lack of firm knowledge as to whether divestiture will be required after the Commission's reconsideration". If a specified divestiture period is deemed necessary, Gill says, it should be of five years duration beginning when the Commission has resolved all of the communications media cross-ownership questions—five years duration to avoid needless injury to present owners and to be consistent with Commission decisions in other, com-

parable situations, and the delayed starting time for reasons indicated in paragraph 27 supra. In addition, Gill urges that a cable operator be allowed to complete development of his cable facility pursuant to his pre-July 1970 plan even if that involves franchises acquired after July 1, 1970, because failure to do so will prevent numerous communities islanded within a cable facility's general service area from obtaining cable service for some time and will needlessly depress the resale value of the cable system, and because, "So long as it is understood that expanded portions of the system are to be divested along with the rest, there is no reason why the operator should not be permitted to . . . construct and operate newly franchised segments of his system until such time as the whole system is sold."

29. *Cross-interest:* The Commission is requested by CTI,[5] King, and Post to permit television station licensees to have a minority interest in co-located cable systems, on the grounds that prohibition of such cross-relationships is unprecedented and unnecessary to achieve the Commission's purposes (Post, King), that it denies a source of revenue that financially marginal stations may need in order to continue their broadcast service (CTI), and that it deprives cable systems of investment funds from television licensees who may wish to assist a cable capable of increasing their station's audience. If the Commission aim is arm's-length competition, King asks, would it not suffice to limit the "any interest" ban to the primary area and omit the secondary area?

30. *Replacement or modification of the "predicted Grade B contour" measure of co-location* is urged by BPI, Carter, CTI, King, Liberty, McClatchy, and Midcontinent. In King's view, the Grade B contour marks off a forbidden area which is much too large, and thus may deprive "outlying communities" within that contour of needed cable service even though in such places the cable system and the central-city TV station are not rival outlets.[6] King recommends the substitution of either a smaller, fixed-mileage area (e.g., the 35-mile zone recommended by McClatchy and Midcontinent) or, where pertinent, the U. S. Census Bureau-determined Standard Metropolitan Statistical Area ("SMSA") in which the station operates. King argues that a cable system within a small outlying community is not a local rival to a central-city station because the station cannot be a "local outlet" there whereas the system will find it advantageous to focus, in its cablecasting, on the needs and interests of its own community. Moreover, King notes, that, in communities more than 35 miles from the center of the station's market, distant-signal importation (a form of competition far more formidable than cablecasting) would not seriously affect even marginal UHF and small-market stations. Midcontinent contends that outlying communities within a cross-owned station's Grade B contour are unlikely to be particularly influenced by that station's current affairs programming because such communities (i) typically receive many "overlapping stations," and (ii) in any

[5] With particular reference to financially marginal UHF stations.

[6] King concedes that there may be outlying communities, in the station's secondary area, which are large enough to support cable systems truly competitive with a cross-owned central-city TV station, but suggests that special rules could be devised to deal with such situations.

event are small-townish in outlook, unlike the orientation of a big-city TV station.

31. King further contends that advertising solicitation by cablecasters would not cause any problems for the central-city station, since local firms in TV stations' secondary zones can't afford TV broadcast advertising, although they can be a good advertising source for cablecasters. Also, King argues, ownership of cable systems within its service areas does not give a TV station a competitive advantage over other TV stations in the same market since (1) systems are required by Commission rules to carry the signals of all same-market stations and to give them equal rights with respect to channel position, program nonduplication, etc.; and (2) the Commission's control over TV licensees who operate cable systems is more effective than its control over non-broadcaster operators of cable systems.

32. Midcontinent and McClatchy challenge the Commission's assertion, in the *Second Report*, that use of the predicted Grade B contour as the co-location boundary line contributes to administrative certainty, by citation of the Commission's statements, in paragraph 48 of the *Notice . . . in Docket No. 18397*, that (i) the predicted Grade B contour varies from station to station and may extend as far as 60 miles from the station's transmitter, and (ii) a fixed-mileage standard would be administratively convenient and would provide certainty to those affected since air-mile distance from a specified point could be readily calculated without reference to contour maps in the Commission's offices or the necessity of an evidentiary hearing to resolve disputes.

33. King [7] contends that a standard resulting in a smaller co-location area than that marked off by the predicted Grade B contour would be consistent with recent Commission actions in other proceedings. King notes that in the broadcast one-to-a-market proceedings, the Commission adopted as its area-demarcation standard not the Grade B but the Grade A contour. Moreover, King continues, in that proceeding the Commission noted that UHF stations and many FM stations still needed association with other local media to facilitate their growth, and thus built cross-ownership exceptions into the rule regarding such facilities in overlap situations. Particularly in secondary areas, King contends, cable is in an even less advanced state than UHF and FM, and should receive similar treatment. King also states that the Commission recently adopted a specific-waiver provision permitting telephone common carriers to provide cable television service to communities that would not otherwise obtain it. It argues that a broadcaster also has a special motivation to provide cable service to remote communities, can do so more economically than other potential owners, and can cablecast programming at less cost than a telephone company can (and is therefore more likely to).[8]

34. CTI suggests [9] that the cross-ownership limitation, if deemed necessary, be limited to those counties in which a station has a net

[7] Citing 22 FCC 2d 306, 312 (par. 22), and 318–19 (pars. 45, 47, and 48) (1970).
[8] King contends that this telephone company-cable system cross-ownership exception relies on waiver rather than a general rule for reasons that do not apply in the context of Section 76.501; i.e., (i) the difficulty of establishing a rational border-delineation standard, and (ii) charges of competitive abuse.
[9] With particular reference to UHF television stations.

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weekly circulation of at least 70% (i.e., those areas in which "the broadcaster may at least arguably be in a position to influence opinion to a significant degree"). BPI, citing its own situation, considers it unreasonable to bar television station ownership of a cable system in a county in which Commission-endorsed data indicates that the station is not "significantly viewed". Liberty suggests three other alternatives which, alone or together, would in its opinion strike a balance between the goals of (i) insuring substantial program diversity, and (ii) fostering development of cable (as an essentially passive reception facility) in sparsely settled areas. Specifically, Liberty recommends (1) limitation of the station-system cross-ownership with systems which have more than 2500 subscribers within the station's community of license, SMSA, or Area of Dominant Influence ("ADI"), and (ii) providing that the total number of subscribers to systems which are cross-owned with a TV station and within its Grade B contour shall not exceed 15 percent of that station's NWC, or (3) exemption of systems with fewer than 2500 subscribers from the cross-ownership ban.[10] On behalf of these three proposals, Liberty states: re (1), that the top 100 markets contain the vast majority of TV homes, are the source of most TV revenue, and hold the real promise for program origination by cable systems; that below-top-100 markets offer little opportunity for large systems with potential for significant program origination, but do need cable systems to fill over-the-air signal reception gaps; and that ultimately, cross-ownership of TV stations and cable systems in small markets may be necessary to maintain the viability of local over-the-air TV broadcast facilities there; re (2), that the proposed 15% limitation would prevent a broadcaster from obtaining a subscriber base sufficient to raise a question of undue concentration of control; and, re (3), that TV station cross-ownerships with co-located systems with fewer than 2500 subscribers (i) pose no problems with respect to programming diversity since such systems normally cannot engage in program origination anyway, and (ii) pose no threat of undue concentration of control.

35. *Preemption:* BPI urges that, if the TV station-cable system local-cross-ownership prohibition is rescinded or substantially modified, the Commission preclude State and local authorities from imposing more restrictive cross-ownership limitations than ours.

DISCUSSION OF PLEADINGS

36. As indicated in the foregoing paragraphs, the respondents favoring rescission of the cross-ownership et al. provisions in Section 76.501—either totally or insofar as they apply in particular to national broadcast television networks, or to co-located television stations (all,

[10] In a recently tendered supplementary pleading, Liberty substituted the following alternatives: (1) restrict the general ban on cross-ownership of co-located TV stations and cable systems to the top 100 markets; in smaller markets, limit the ban to systems with 10,000 or more subscribers (in order not to discourage at least limited cable origination); or (2) (i) prohibit TV station-cable system cross-ownership within the community of license; (ii) authorize cross-ownership of smaller systems (i.e., with fewer than 10,000 subscribers) outside of the community of license; but (iii) provide that in no event shall the total number of subscribers of the cross-owned systems within the station's predicted Grade B contour exceed 25% of the net weekly circulation of the cross-owned TV station; or (3) exempt systems with fewer than 7,500 subscribers from the cross-ownership ban.

or commercial UHF, or noncommercial educational)—argue variously that: the record relied upon by the Commission was insufficient; additional facts submitted by the respondents negate the Commission's conclusions; the Commission lacks statutory authority to impose such restrictions; inadequate notice of proposed rule making was given to network cross-owners; adoption of the rule reverses the Commission's previous position expressed in Docket No. 15415; and (6) developments subsequent to the adoption of Section 76.501 have washed away its foundations.

37. The question of notice of proposed rule making regarding cross-ownership of cable systems with networks diminishes against the circumstances that: (i) in view of the introduction of the question of notice, we have reviewed ABC's and NBC's substantive arguments regarding network-cable cross-ownership, contained in their petitions for reconsideration, in the same manner, according them the same weight, as if their submissions had been received before the *Second Report* was issued; and that, (ii) with respect to the relation of this procedural question to the divestiture provisions applicable to networks, the three-year divestiture grace period specified in the *Second Report* does not expire until this coming August, and we have in any event (in view of the considerable passage of time between the issuance of the *Second Report* and this memorandum opinion and order) decided to extend the grace period even further in order to avoid hardship to existing cross-owners.

38. Although we have given thoughtful consideration to the petitioners' other contentions, we remain persuaded that the provisions of Section 76.501 prohibiting ownership, operation, control, or interest of a cable television system with a national broadcast television network or a co-located television broadcast or translator station, and requiring divestiture of such prohibited cross-relationships by a date certain, are in the public interest and should continue in force.

39. Our adoption of these provisions—designed to foster diversification of control of the channels of mass communication—was guided by two principal goals, both of which have long been established as basic legislative policies. One of these goals is increased competition in the economic marketplace; the other is increased competition in the marketplace of ideas.

40. We did not choose to wait until cable reached maturity before acting to achieve these goals. Having grappled over the years with the problems of cross-media control of radio and television stations, by national broadcast networks, and by newspapers and other broadcast stations in the same communities and market areas, we had become increasingly persuaded, first, that cross-media control is generally undesirable (although temporary exceptions are sometimes warranted); second, that the evidence of previously developed electronic mass media indicated that, in the absence of regulatory prohibition, considerable cross-media control of cable television could be expected, and that tendencies in that direction had already begun; and, third, that cross-media control of cable would become increasingly difficult to halt and reverse as cable grew if its growth were not accompanied by early-imposed regulations designed to foster diversification of control.

41. Some of the data leading to the second conclusion were summarized in paragraphs 9 and 10 of the *Second Report*. That was not intended to demonstrate that "abuses" of cable system ownership were taking place to any significant degree, or that broadcasters' control of cable facilities had already advanced to major proportions. What it did demonstrate was that the major broadcast television networks were already such dominant influences in the television field that any further expansion of their ownership or control into the new and growing cable television industry was per se undesirable, and that such network involvement in cable should be stopped and turned around before it became entrenched; and that about 30% of the cable systems in existence in December 1968, were broadcaster-controlled.[11] Newhouse in its petition for reconsideration indicates that, as of the date of issuance of the *Second Report*, approximately 400,000 cable subscribers—close to 10% of the total number of cable subscribers at that time—were served by systems within the predicted Grade B contours of television stations under common ownership with those systems.

42. CTI characterizes our adoption of cable cross-ownership rules as a "mechanical transfer" of broadcast concepts to cable notwithstanding "fundamental technical and competitive distinctions between . . . [them]." Whatever distinctions may exist between TV stations and cable systems, it is nonetheless true that actions taken by cable system operators—to carry or not carry certain distant stations, to offer program origination or not, to move speedily or at the slowest pace permitted to develop access channel facilities and encourage their use—all can affect the audiences and earnings of co-located television stations. In the light of this fact, we remain persuaded that cable systems are more likely to grow, in size and service to their subscribers if they are not under common control with co-located television stations. We have not been shown that cable growth will be significantly retarded by the unavailability, under our rules, of financial investment by co-located stations.

43. We do not agree with the contention that new developments have washed away the case for cable-broadcast cross-ownership restrictions. Our adoption of the *Cable Television Report and Order* was designed to encourage the growth of cable; to the extent that our efforts in that regard are successful, the time available to us for early preventative action with respect to cross-control of cable and other media is foreshortened. The assurance we are offered that cable will ultimately become essentially a "common carrier" of mass communications may or may not be correct, but in either event fails to come to grip with the short run, during which origination cablecasting can be expected to play a significant role in attracting, and affecting, cable subscribers.

44. Our reasons for not exempting UHF television stations from the general applicability of Section 76.501 are well summarized in paragraph 16 supra, and do not require repetition here. Our reasons for not exempting educational television stations are essentially the same as those previously indicated by us in footnote 1 of the *Notice*

[11] By March 30, 1972, according to *Television Factbook* (1972–1973 ed., p. 75–a), broadcasters held ownership interests in some 37.9% of the 2,839 cable system operations.

of Proposed Rule Making and of Inquiry in Docket No. 18891 (35 Fed. Reg. 11042 July 9, 1970), released concurrently with the *Second Report;* the arguments in favor of exemption set forth in paragraph 17 supra do not extend significantly beyond those of which we were aware at the time of issuance of the *Second Report* and the *Notice . . . in Docket No. 18891;* and in certain particulars—notably NAEB's assertion that ETV cross-owners could coordinate the programming activities of the ETV station and the cable system so that imported signals would not have an adverse effect on the ETV station's offerings—are uncomfortable reminders of some of the disadvantages of cable cross-ownership with local commercial television.

45. The question of our jurisdiction to adopt rules concerning diversification of ownership of cable television systems is adequately treated in paragraph 17 of the *Second Report*, and requires no further elaboration at this juncture.

46. In the preceding paragraphs, we have (in response to a number of petitions for reconsideration in this matter) set forth our basic present position with respect to the cable cross-ownership provisions in Section 76.501 of our Rules.

47. Having done so, we must also express our recognition that a requirement of mandatory divestiture of existing such cross-ownerships is more severe in its impact on affected broadcasters—and hence requires greater justification—than a rule prohibiting only the subsequent creation of such cross-relationships. We are well aware of the Supreme Court's admonition, in *Timken Roller Bearing Co.* v. *U.S.*, 341 US 593, 603 (1951), that "divestiture . . . is not to be used . . . whe[re] other effective remedies, less harsh, are available."

48. Moreover, it must be conceded that in at least one respect, the need for a prohibition against cross-ownership et al. of co-located stations and systems—and for mandatory divestiture—has abated somewhat as a result of the Commission's recent adoption of Section 76.251 of the Rules (in the *Cable Television Report and Order in Docket No. 18397*, 36 FCC 2d 143, released February 3, 1972). That section provides that all cable television systems operating in major market areas—where approximately 70 percent of the American people reside—must, by March 31, 1977, maintain public-access, education-access, and local-government-access nonbroadcast channels, and promptly expand their facilities as needed to meet demand for leased-access nonbroadcast channels; and that "Each such system shall exercise no control over program content on any of th[ese] channels . . ." Although this recent development is not sufficient to alter our basic view regarding the provisions of Section 76.501, it does suggest that there may be several more station-system local-cross-ownership situations than we had previously anticipated in which the balance of relevant considerations now weighs in favor of a waiver of the mandatory-divestiture requirement.

49. In paragraph 13 of the *Second Report and Order in Docket No. 18397* (issued in July 1970), we stated that "we would consider waivers on an ad hoc basis where it is clearly established that a cross-ownership ban would not result in greater diversity, and in footnote 6 we added that "There may, for example, be some sparsely inhabited area where no one is willing to apply for an available broadcast chan-

nel except a local CATV operator interested in providing CATV-originated programming to a wider area."

50. It now appears to us that those statements may have actually had the effect of inhibiting, rather than encouraging, the submission of justifiable requests for waiver of the divestiture requirement: there may well be a number of other grounds and circumstances which, if properly argued and substantiated by petitioners, would result in the grant of specific waivers.

51. Accordingly, we invite the filing—within 120 days after the issuance of this memorandum opinion and order—of petitions for waiver of the mandatory-divestiture requirement (fully supported by pertinent facts, views, arguments, and data) from all cross owners et al. of co-located television stations and cable systems who believe that grandfathering would be appropriate in their case. Upon the receipt of a number of such petitions, they will be carefully reviewed by the Commission to enable us to pick out, on a rational and consistent basis, those situations in which the issuance of a waiver (or other appropriate relief) would both serve the underlying objectives of Section 76.501 and avoid unnecessary hardship. Where such a waiver is granted, the petitioner's interests in the affected station and cable television facility may not subsequently be transferred to a new joint holder without prior approval of the Commission, upon a showing by the petitioner that such transfer(s) would serve the public interest.

52. It would be premature for the Commission at this time to specify the grounds for waiver which it will find acceptable, or to list the evidence necessary to support such grounds. We will certainly be interested in such aspects as (1) the extent (if any) of financial loss the cross-owner would suffer as a result of mandatory divestiture; (2) the impact of the station-system cross-relationship upon economic competition and diversity of control of media of expression in the service areas of the stations and systems in question; and (3) the quality of service which the system has been providing (in terms of broadcast signal carriage, cablecast programming by the system and others, system technical quality and reliability, etc.), and the extent to which it has been enhanced, or impaired, by the cross-relationship. But this itemization is intended only to be suggestive, and the Commission does not at all assume that it exhausts the possibilities.

53. We recognize, of course, that this process will further extend the period of uncertainty which has existed during the two-year pendency of the petitions for reconsideration of the *Second Report and Order in Docket No. 18397*, and accordingly we have also decided to generally extend the grace period for divestiture of prohibited cross ownerships et al. until August 10, 1975.

Accordingly, IT IS ORDERED, That the petitions for reconsideration filed in response to the *Second Report and Order in Docket No. 18397* ARE DENIED in all respects except that indicated below.

In view of the foregoing, and pursuant to authority contained in Sections 4(i), 5, and 303(r) of the Communications Act of 1934, as amended, IT IS FURTHER ORDERED, That effective March 2,

1973, Section 76.501(b) of the Commission's Rules is amended to substitute "August 10, 1975", for "August 10, 1973".

IT IS FURTHER ORDERED, That the proceeding in Docket No. 18397 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

DISSENTING STATEMENT OF COMMISSIONER ROBERT E. LEE

I was a member of the Commission at the time of the adoption of the Second Report and Order, 23 FCC 2nd 816, and at such time voted against the adoption of such restrictions of cross-ownership which are now encompassed in Section 76.501, formerly Section 74.1131. Pursuant to such Order a number of such cross-ownership licensee's, in good faith, have complied with our divestiture rules—perhaps to their economic detriment.

We now have before us Petitions for Reconsideration of that Second Report and Order. As stated earlier, I prefer to grandfather all such cross-owned systems which were in being prior to June 24, 1970, the date of the Second Report and Order.

I am not persuaded to concur with the majority's decision which would treat this problem by entertaining requests for waiver from the affected parties.

DISSENTING STATEMENT OF COMMISSIONER NICHOLAS JOHNSON

I dissent from the majority's resolution of our reconsideration of § 76.501 for the sole reason that I can see no reason for encouraging currently cross-owned systems to file waiver requests. In view of the obvious diversity of views among my colleagues with respect to this reconsideration report, I wish to make it clear that I strongly favor our current rules prohibiting the cross-ownership of cable and broadcast interests in the same market, and I am opposed to any policy which would have the effect of grandfathering those cross-owned systems which have chosen to "gamble" on the outcome of the instant reconsideration proceeding.

Waivers of our cross-ownership rules should only be granted where—as in all other waiver request situations—the applicant carries its very heavy burden of proof. The majority's "liberal" waiver policy with respect to currently cross-owned systems appears to modify our traditional waiver approach and will, no doubt, result in the eventual Commission approval of numerous existing patterns of cross-ownership. In my view, such an approach does not encourage the diversity of media views which our cross-ownership rules are designed to engender.

Further, such an approach is decidedly unfair to those cable systems which, once apprised of our cross-ownership rules and our consequent divestiture requirements, sought to divest themselves of their offending interests within our three year deadline. Our current resolution of this reconsideration proceeding thus has the effect of actually penalizing those cable operators who chose to conform to our rules. I believe that such discriminatory treatment can only be viewed as a reward to those broadcasters and cable systems who preferred to forestall—rather than to capitulate to—the inevitable.

This infant industry is still young enough that mere reference to "grandfathers" is a little amusing. In fairness, I believe all participants should at least start at the same starting line. Why should some cable operators have a substantial competitive advantage over their competitors in this industry because the FCC, in its discretion, has accorded it to them? The "burdens" on the industry of equitably enforcing these standards across the board would be minimal in 1973.

I also dissent from the majority's decision to extend—for two more years—the time in which currently cross-owned systems may have for divestiture. Those systems which petitioned for reconsideration of our rules should not now be rewarded for delaying tactics. I would, therefore, require divestiture by August 10, 1973, as we initially provided when we adopted § 76.501.

CONCURRING STATEMENT OF COMMISSIONER CHARLOTTE T. REID

I was not a member of the Commission at the time of the adoption of the Second Report and Order, 23 FCC 2nd 816, but had I been, in all probability, I would have voted against the adoption of such restrictions of cross-ownership which are now encompassed in Section 76.501, formerly Section 74.1131. However, the majority did adopt the rule and a number of such cross-ownerships have complied with our divestiture rules.

We now have before us Petitions for Reconsideration of that Second Report and Order. While I would have preferred to grandfather all such cross-owned systems which were in being prior to June 24, 1970, the date of the Second Report and Order, I am persuaded to concur with the majority's decision since it is clearly evident that there is not a majority favoring grandfathering of such systems. I want to make it explicitly clear however, that I have joined in this action to retain our general cross-ownership rule with the majority's understanding that we will treat requests for waiver from the affected parties very liberally.

CONCURRING STATEMENT OF COMMISSIONER RICHARD E. WILEY

I concur in the Commission's action denying the petitions for reconsideration of our cross-ownership rules but holding out the possibility of waiver of our divestiture requirement upon a public interest showing. While I do not favor rescission of our rules at this time, I would have preferred a policy of grandfathering existing cable systems and co-located television stations for the reasons stated by many of the petitioning parties—not the least of which is that divestiture may be an unnecessarily harsh remedy. However, there were simply not four votes for my position. For example, my colleague Commissioner Hooks favored repeal of the rule, but would not support a policy of grandfathering. Accordingly, under the circumstances, I concur in the hope that a reasonable waiver policy will be implemented by the Commission.

DISSENTING STATEMENT OF COMMISSIONER BENJAMIN L. HOOKS

As is apparent from the magnitude of attention given to this issue,[1] the Commission was here faced with what I consider a critical question concerning the structure of the broadcast/cable television industry in this country. That is, whether broadcasters are to be permitted to extend their local communications businesses and expertise into a media that just might supersede broadcasting—cable television.

Underlying the Commission's decision in this matter are, at least, three arguments which have some very real appeal: (1) the Commission's historical anti "duopoly" [2] sentiments; (2) a desire to leave, to the extent possible, the cable field open to new interests, and particularly minority groups which have heretofore been denied significant participation in the mass media; [3] and (3) strangulation of cable development.

While the Commission is to be commended for its sincere and laudable concern over the foregoing problems—and particularly its sensitivity to the minority situation which, needless to say, is a paramount concern of mine—I must record that I am not convinced that, in the long run, these rules are necessary or correct to achieve these desirable goals. I shall attempt to explain my personal reasoning.

Initially, the rules are simply a transposition of the philosophical principle of "duopoly" now applicable to broadcasting. The patent purpose of the "duopoly" policy is to ensure that no private interests monopolize the vital channels of communications in any given area; and conversely, to promote a multiplicity of news, public affairs and entertainment voices in the community. Insofar as the "duopoly" rules relate to broadcasting stations—and particularly those in the same service (e.g., TV service, AM and FM radio service)—the Commission's objectives can be reasonably supported and I do support them generally.

However, the "duopoly" concept, whatever its merits in the case of broadcast stations, could very well be superfluous where broadcast/cable cross-ownership is involved because of the differing characteristics of the two media. Firstly, cable systems developed and exist not to deliver the single signal of the operator, but to bring to the community distant signals theretofore unavailable, as well as the local signals. That is chiefly the nature of contemporary cable systems. Couple these additional broadcast signals with governmental, public access and perhaps a 50–60 channel capacity delivering everything from television to newspapers to general data and it is clear that the modalities of cable

[1] The specific issue is pregnant on reconsideration from the *Second Report and Order* (Docket No. 18397) and focuses on Section 76.501 (originally Section 74.1131) of our Rules, 47 C.F.R. Section 76.501. In essence, the rule prohibits a broadcaster or cable operator from owning both a cable system and a broadcast station in a geographic area where the predicted Grade B contour of that station and the cable system service area overlap.

[2] In short, the Commission's "duopoly" (and derivative multiple/cross-ownership rules) prohibit the same party from having two or more broadcast facilities which cover primarily the same audience. For the rules adverted to, and exceptions thereto, see Sections 73.35, 73.240 and 73.636 of Chapter 47 of the Code of Federal Regulations.

[3] This concern for minorities created somewhat through the efforts of groups like Black Effort for Soul in Television (BEST), is manifested in the cable franchise rules which seek to ensure due process in grants as well as our access channel rules.

itself preclude the sort of dominance misapprehended by the majority.[4]

Tangential to the apprehension of "duopoly" is the fear of impediments to the development of cable. However, short of a categorical ban on local broadcast/cable cross-ownership; the Commission could have prescribed rules which, for example, would have mandated channel availability on free or lease basis; or it could have placed reasonable limits on network or conglomerate ownership; or it could have established a cut-off limit with respect to the number of subscribers served by a single cable interest. These lesser strictures might have served the necessary purpose and if the experience later demanded more stringent measures such as prohibition and divestiture, they could have been imposed as the operative method of preventing problems which are now purely speculative. Prohibiting businessmen from engaging in a legitimate enterprise and divestiture of lawfully acquired property is a last-resort sort of remedy rather than a preventative engendered by cautious conjecture.[5]

In this connection, it seems to me that the Commission's prohibitions sustained herein are tantamount to some unthinkable federal order which would have decreed, at the turn of the century, that buggy makers could not enter the automobile business even though the technology of the latter business appeared to have the potential to eclipse the former, because of the fear that buggy manufacturers would impede automobile development out of an economic interest to preserve the buggy industry. Studebaker, for instance, never could have made a car had the government, out of an abundance of concerned caution, imposed such a ban. This is exactly how some believe that broadcasters would squash cable. It could be as was remarked by C. J. Darling: "Men would be great criminals did they need as many laws as they make." [6]

Another strong argument in favor of the rule as adopted—and one which I am acutely attuned to—comes from those who fear that allowing broadcasters to own cable systems will prevent minority interests from "getting a piece" of this burgeoning communications tool. Correctly believing that they were previously excluded (that is, effectively excluded) from equity in the broadcast industry, they see cable television as a panacea and the only means available to get a foothold in the mass media. Much as I, too, would like to believe in a panacea, and recognizing that minority cable ownership is desirable and possible, I trust that minorities will continue to plug for a foothold in this new media without abandoning collateral efforts for representation and ownership in conventional broadcasting. In the relatively short time I have been Commissioner, I have witnessed an increasing awareness on the part of broadcasters of problems relating to minority ownership, employment, and programming. The Commission is keeping them

[4] The so-called "Seiden Report" ("Mass Communications in the United States") cited in the majority opinion and by those opposing this rule is instructive on the issue of market dominance. The "Seiden Report" states that "there is a very large diversity of media available to the public, in virtually every market regardless of size" and that "co-located cable television cross-ownership could not and would not significantly affect it."

[5] While I recognize that the cross-ownership prohibition does not go so far as to prevent a broadcaster from going to a distant market and entering the cable business, very few independent broadcasters know enough or care enough about some city where they are not involved in the economic, political, and social affairs to so do. These are local businessmen who, like all of us, need a home base of operations.

[6] *Scintillae Juris* (1877).

aware and as far as I am concerned this agency has just begun to fight. Moreover, I have been encouraged and, frankly, delighted at the increasing number of acquisitions of broadcast properties by minority groups in recent months [7] and I am given to understand that many more are in the works. Concomitantly, I believe that just as minorities are advancing—albeit, too tardily—in the broadcast field, they will obtain ownership interests and meaningful managerial positions in the cable industry. I further believe that minorities have a misplaced fear about their inability to compete with broadcast interests for cable franchises. Competent minority entrepreneurs are now competing against local monied interests, large cable operators, and broadcasters willing to enter the cable field in cities remote from their stations and, in many cases, coalescing with these groups to form new, integrated firms. The economic dynamics of the market will determine the shape of cable development. We have and are witnessing the formation of giant cable television firms because of economic incentives and necessity; the "mom and pop" systems we once dealt with are mainly destined for extinction. Big broadcast interests, if allowed to fairly compete, could have balanced the potential dominance of several large (and still growing) system operators.

In that connection, and despite their inexcusable failure to include minorities in meaningful roles (which failure I have increasingly railed against), I think that large broadcasters have demonstrated a great deal of public responsibility and attentativeness to the business of communications across the years. Had they been permitted to compete equally for cable we might have had a faster growth of the cable industry. The fact that many non-broadcast groups have gotten cable TV systems in many areas of the country would have, in itself, provided a competitive spur. And, neither the public nor the Commission would have allowed a broadcast/cable operator in city "A" to do less with its franchise than a non-broadcast cable interest in city "B". Marketplace competition, local governments, public interest groups, and the prodding of the Commission would have dictated rapid cable television development in the public interest, convenience and necessity. Minority groups, using their leverage and influence with all competitors stand a better chance of securing their goals.

Finally, we come to the matter of grandfathering. It seems to me that once having proscribed broadcast/cable cross-ownership in the same community, and caused already large scale divestiture thereby (e.g., Time-Life, Triangle), it would be inequitable to allow those who held on simply because they felt or took the chance that they might later be favored to have an edge on those who, in good faith, divested. In short, I am against grandfathering of present cross-ownership holdings even though I would not have originally voted for the ban on cross-ownership. If the reason for the rule is as good as the majority thinks—and I believe history will record that it is not—then it should be applied as if we fully believe in underlying policies. Let us not riddle the rule with automatic "grandfathering" which, naturally, is a clear admission that the policy reasons for the

[7] See an excellent chronicle of this phenomenon in West, *A Question of Control, Ownership and Role,* The Washington Post (Washington, D.C.) January 29, 1973 at B1, col. 1.

ban are somehow not very important or only important in some cities. That is not to say that in a compelling situation where the ultimate public interest would be manifest by selective "grandfathering" I would not favor such action. I would, however, not invite waivers or be loose in granting them.

In conclusion, I would like to repeat some recent remarks of Chairman Dean Burch [8] which, although discussed in a different context, are just as pertinent to the issue here involved. Mr. Burch observed that "the Commission would always do well to be sure of what it's doing before it does anything at all" and that "if it's a head cold you want to cure, don't tinker around with experimental brain transplants." There is also some sage language about the government's proper role in regulating "other people's business[es]" that merits consideration.

[8] Address by Dean Burch, Chairman, Federal Communications Commission before the Hollywood Radio and Television Society (Los Angeles, California, January 11, 1973).

F.C.C. 73R-67

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
CALIFORNIA STEREO, INC., SACRAMENTO, CALIF.	Docket No. 19515 File No. BPH-7668
INTERCAST, INC., SACRAMENTO, CALIF.	Docket No. 19516 File No. BPH-7669
EDWARD ROYCE STOLZ II, TRADING AS ROYCE INTERNATIONAL BROADCASTING, SACRAMENTO, CALIF.	Docket No. 19611 File No. BPH-7924
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted February 7, 1973; Released February 9, 1973)

BY THE REVIEW BOARD.

1. Before the Review Board is a petition to enlarge issues, filed July 5, 1972, by Intercast, Inc. (Intercast) requesting the addition of financial qualifications, studio adequacy, and misrepresentation issues against California Stereo, Inc. (California Stereo).[1]

FINANCIAL QUALIFICATIONS ISSUES

2. Intercast argues that financial issues are warranted to explore California Stereo's costs and to determine whether it will have available sufficient funds to meet its construction and first year operating costs.[2] According to petitioner, an amendment to California Stereo's application, filed March 9, 1972, provides $54,760.00 for "other operating costs, salaries, expenses, etc.," out of its total proposed costs of $87,594.10. Three of California Stereo's proposed staff of nine, Inter-

[1] Also before the Review Board are the following related pleadings: (a) Broadcast Bureau's opposition, filed July 19, 1972; (b) supplement to petition to enlarge issues, filed July 31, 1972, by Intercast; (c) erratum to (b), filed August 1, 1972, by Intercast; (d) Broadcast Bureau's comments to (b), filed August 11, 1972; (e) opposition, filed August 28, 1972, by California Stereo; (f) reply, filed September 8, 1972, by Intercast; (8) petition for leave to file a late pleading, filed September 11, 1972, by Intercast; (g) supplement to (f), filed September 11, 1972, by Intercast; and (h) supplement to (e), filed September 11, 1972, by California Stereo. Two matters warrant comment. First, in our Public Notice on the *Filing of Supplemental Pleadings Before the Review Board*, No. 90836, released October 11, 1972, we expressed our concern with the delays caused by the filing of supplemental pleadings. See also *Salem Broadcasting Co., Inc.*, — FCC 2d — 25 RR 2d 955 (1972); *Southern Broadcasting Company (WGHP-TV)*, FCC 73R-17, released January 12, 1973. In this case, Intercast supplemented its petition, which resulted in the Bureau and California Stereo filing supplements to their responsive pleadings, thereby delaying our consideration of this matter. In addition, petitioner supplemented its reply pleading. We look with disfavor on these practices, noting that the delay they cause is of the parties' own making. See *Southern, supra*. Second, Intercast's unopposed petition for leave to file late pleading will be granted. It appears that Intercast was confused over the time limit available to it to file a reply pleading and the pleading is only one day late.

[2] The two issues seek to determine:

1. Whether the budget submitted by California Stereo, Inc. is adequate to cover first year construction and operating costs.

2. Whether California Stereo, Inc. has sufficient funds to meet a budget encompassing realistic construction and first year operating costs.

cast continues, are covered by California Stereo's executive personnel "Pledge Agreement" and its "Plan of Finance" which provides a total of $27,000.00 for the three executive employees, thereby leaving a total of $27,760.80 to cover the salaries of the other six staff members. This averages out to salaries of $4,626.00 per employee per year, or approximately $89.00 per week, which, Intercast argues, is inadequate to hire such personnel as chief engineer and disc jockeys in a market the size of Sacramento, California. Moreover, Intercast continues, out of this same $27,760.80, California Stereo has budgeted for such operating expenses as telephone, utilities, line charges, office supplies, promotion, travel, tapes, and UPI or AP wire service charges. Furthermore, since California Stereo has not adequately provided for studio space (see paragraph 6, *infra*), Intercast asserts, the $1,800.00 it has budgeted for its studio is inadequate.

3. The Broadcast Bureau opposes the request, arguing that Intercast failed to submit affidavits from individuals with personal knowledge of California Stereo's financial proposal as required by Commission Rule 1.229(c). In its opposition, California Stereo argues that it has adequately provided funds to cover staff salaries. By presenting a breakdown of its proposed operating costs of approximately $74,100, which covers all the expenses enumerated in Intercast's petition including $39,000 for salaries, California Stereo asserts that it has proposed sufficient funds to cover all its necessary first year expenses. California Stereo further asserts that it will have a cushion of nearly $4,000.00 ($95,250.00 funds available less $91,500.00 expenses) to cover any additional expenses.

4. In reply, Intercast asserts that California Stereo's clarification of its pre-operating and operating costs only substantiates Intercast's claims that California Stereo's proposed operating expenses are unrealistic. The proposal of $39,000 for salaries less the $27,000 proposed executive salaries would leave only $12,000 for the remaining six employees or $2,000.00 per employee per year, Intercast argues. Intercast further maintains that "the funds which it [California Stereo] is relying upon to establish its financial qualifications are inadequate"; therefore, a financial issue to explore California Stereo's funds available is warranted.

5. Petitioner's request for financial issues against California Stereo will be denied. Generally, the Board will not add a cost estimates issue unless the applicant's estimates are unreasonable on their face,[3] or challenged by specific facts based on affidavits from persons with personal knowledge of the facts.[4] In the Board's opinion, California Stereo's salary estimate of $39,000.00 for nine staff members is not unreasonable on its face and Intercast's assertion to the contrary is based on mere speculation and surmise.[5] Thus, petitioner has not established by affidavits from persons familiar with the prevailing rates of compensation in the Sacramento area or by other means that California Stereo could not hire its proposed staff for $39,000.00.

[3] See *Viking Television, Inc.*, 17 FCC 2d 823, 16 RR 2d 123 (1969); *Eastern Oklahoma Television Co., Inc.*, 28 FCC 2d 31, 21 RR 2d 494 (1971).
[4] See *Snake River Valley Television Inc.*, 16 FCC 2d 613, 15 RR 2d 775 (1969); *Community Broadcasting Company of Martsville*, 16 FCC 2d 647, 15 RR 2d 814 (1969).
[5] See *Folkways Broadcasting Company Inc.*, 33 FCC 2d 806, 23 RR 2d 992 (1972); *Martin Lake Broadcasting Company*, 23 FCC 2d 721, 19 RR 2d 277 (1970).

Finally, Intercast has not adequately supported its request for an availability of funds issue. Like the cost estimates issue, this, too, is based merely on speculation and surmise.

STUDIO ADEQUACY ISSUE

6. Next, Intercast argues that California Stereo's proposed studio is too small to accommodate an FM radio station. According to Intercast, the 260 square feet of space, or a room 16 by 16 feet, proposed by the applicant [6] will have to be partitioned to provide a programing booth, space for telephone, typewriters, UPI or AP wire service machines, desks for employees, places to store office supplies, station records and program materials, and places for technical equipment such as turntables as well as space for participants in public service programs. In Intercast's view, such a proposal is inadequate. Both the Bureau and California Stereo oppose the request. California Stereo argues that the Commission's only criterion for studio proposals is that the "proposal be reasonable for the intended operation". Respondent claims that its proposed studio is adequate for an FM station. California Stereo attaches to its opposition pleading architectural drawings showing the proposed studio configuration as a series of three rooms in a space 8 feet wide and 32 feet long.[7]

7. In our opinion, California Stereo's studio proposal is not unreasonable on its face, and petitioner has failed to raise any serious questions that have not been satisfactorily explained by the applicant. With the aid of Waterman's affidavit (see note 7, *supra*), Intercast argues that inadequate working and equipment space has been provided. However, its generalized assertions are inadequately supported and do not raise the serious questions which would warrant addition of the issue requested.[8] The question is whether the applicant has presented a studio proposal which is reasonably capable of effectuation. See *Birney Imes, Jr.*, (*WMOX*), 27 FCC 225, 17 RR 419 (1959). In our view, California Stereo has done so.

MISREPRESENTATION ISSUE

8. Finally, petitioner contends that California Stereo misrepresented its survey of community needs and interests. Intercast states that California Stereo's amended application claims that 122 community leaders were interviewed; however, upon contacting several of these persons, Intercast avers that it discovered that some were never interviewed and that others, who state they were contacted, were interviewed by telephone and for only a very short period of time. To

[6] Intercast derives its 260 square foot figure by relying upon a letter which was submitted with California Stereo's application from the managers of Plaza Towers where California Stereo proposes to locate its studio. According to the letter, rent starts at 57½ cents per square foot per month. Utilizing the starting rate per square foot and California Stereo's budgeted $150.00 per month for its studio, Intercast determined the studio space would be 260 square feet.

[7] In its reply pleading, Intercast submits an affidavit from Logan Waterman, Jr., holder of a "First Class Radio Telephone Operator Permit", who, after studying the architectural sketches submitted in California Stereo's opposition pleading, avers that, based on his 25 years broadcast experience, California Stereo's proposed studio space is inadequate for a new FM station in Sacramento.

[8] *Cf. WVOC, Inc.*, 32 FCC 2d 765, 23 RR 2d 371 (1971).

support its factual allegations, Intercast attaches to its petition nine unsworn statements—four from individuals allegedly interviewed by California Stereo and five contacted by principals of Intercast. In a supplement to its petition, Intercast provides the affidavits of twelve persons (the original nine and an additional three) who were allegedly contacted by California Stereo. In petitioner's opinion, an issue is warranted to determine whether the interviewees were contacted and whether California Stereo attempted to mislead the Commission by not advising it that such interviews were conducted by telephone and that they were of short duration. The Broadcast Bureau states that, absent a satisfactory explanation by California Stereo, it supports addition of an issue to determine whether California Stereo conducted its survey of community needs as represented.[9] In opposition, California Stereo asserts that nothing in the *Primer*[10] requires that interviews be conducted face-to-face or for some minimum period of time or that advance notice be given to prospective interviewees. California Stereo submits with its opposition pleading an affidavit of Paul E. Anderson, president of California Stereo, who states that he interviewed each of the community leaders Intercast alleges were not contacted or contacted only by telephone. The affidavit specifies the date and time of each alleged interview.

9. In the Board's opinion, Intercast has raised serious questions concerning certain aspects of California Stereo's community survey. These questions merit an evidentiary inquiry at the hearing. In the affidavits submitted by the petitioner, one community leader claims he was "never contacted" by California Stereo, two claim they were "not approached by anyone representing California Stereo", and three aver that they were "not contacted" by any one who claimed to be conducting a survey of community needs. Therefore, at least six community leaders allegedly surveyed by California Stereo claim never to have been interviewed. California Stereo's submission of an affidavit from Anderson detailing alleged survey interviews he had with these six persons does not adequately answer their flat assertions of never having been interviewed.[11] Furthermore, California Stereo's argument that persons are likely to forget interviews conducted several months previously is not persuasive; here, not one, but six persons claim that they were not contacted by the applicant, and the interviews allegedly took place only about three months before the affidavits were executed. In these circumstances, an appropriate issue is warranted. Compare *James J. B. Scanlon (KCAT)*, FCC 70–1218, released November 18, 1970, 35 FR 17968. However, there is no merit to Intercast's other allegations concerning California Stereo's survey. There is nothing in the *Primer*, *supra*, which precludes an applicant from contacting community leaders over the telephone nor does the *Primer* prescribe the duration of each interview; therefore, the fact that California Stereo

[9] However, the Bureau opposes the addition of an issue to determine whether California Stereo attempted to mislead the Commission by not advising it that its interviews with community leaders were conducted by telephone.

[10] *Primer on Ascertainment of Community Problems By Broadcast Applicants*, 27 FCC 2d 650, 21 RR 2d 1507 (1971).

[11] The Board has in the past added appropriate issues where conflicting affidavits were presented by opposing parties. See, *e.g.*, *Folkways Broadcasting Company, Inc.*, 27 FCC 2d 619, 21 RR 2d 163 (1971); *Christian Voice of Central Ohio*, 26 FCC 2d 76, 20 RR 2d 389 (1970).

did not indicate to the Commission that some of its interviews were conducted by telephone or the duration of each interview does not warrant an evidentiary inquiry. See *Primer*, *supra*, 27 FCC 2d at 663, 21 RR 2d at 1522.

10. Accordingly, IT IS ORDERED, That petition for leave to file a late pleading, filed September 11, 1972, by Intercast, Inc., IS GRANTED and the late filed pleading IS ACCEPTED: and

11. IT IS FURTHER ORDERED, That the petition to enlarge issues, filed July 5, 1972, by Intercast, Inc., IS GRANTED to the extent indicated herein, and is DENIED in all other respects; and

12. IT IS FURTHER ORDERED, That the issues in this proceeding ARE ENLARGED as follows:

To determine whether California Stereo, Inc. misrepresented facts to the Commission in connection with its survey of community leaders, and if so, to determine the effect of this conduct on the qualifications of California Stereo, Inc. to be a Commission licensee.

13. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence under the issue added herein SHALL BE on Intercast, Inc., and the burden of proof SHALL BE on California Stereo, Inc.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

109-027—73——3

F.C.C. 73R–65

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of CITY OF NEW YORK MUNICIPAL BROADCASTING SYSTEM (WNYC) For Special Service Authorization To Operate Additional Hours From 6 a.m. (EST) to Sunrise, New York, N.Y., and From Sunset, Minneapolis, Minn., to 10 p.m. (EST)	Docket No. 11227 File No. BSSA–266
CITY OF NEW YORK MUNICIPAL BROADCASTING SYSTEM (WNYC), NEW YORK, N.Y. MIDWEST RADIO-TELEVISION, INC. (WCCO), MINNEAPOLIS, MINN. For Construction Permits	Docket No. 17588 File No. BP–16148 Docket No. 19403 File No. BP–19151

MEMORANDUM OPINION AND ORDER

(Adopted February 5, 1973; Released February 8, 1973)

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING.

1. City of New York Municipal Broadcasting System (WNYC) requests the specification of an "appropriate issue . . . to assure compliance with the National Environmental Policy Act of 1969 (N.E.P.A.)" [1] In the Board's judgment, the action taken by the Commission in issuing a Notice of Proposed Rule Making (*In the Matter of Implementation of the Environmental Policy Act of 1969*, 36 FCC 2d 108) to implement the provisions of the N.E.P.A. indicates that the addition of *ad hoc* issues would not be appropriate. Petitioner has cited no facts from which it might be inferred that either of the proposals could significantly affect the quality of the human environment. However, our denial of the instant petition is without prejudice to the subsequent filing of an appropriate petition should the Commission adopt rules indicating the need for enlargement of the issues while this case is still in adjudication.

2. Accordingly, IT IS ORDERED, That the petition to enlarge issues, filed by City of New York Municipal Broadcasting System, on November 10, 1972, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[1] The N.E.P.A. is found at 42 U.S.C. Sections 4321 *et seq.* WNYC's petition was filed on November 10, 1972; the Broadcast Bureau's opposition was filed on November 22, 1972; on November 24, 1972, Midwest Radio-Television, Inc., filed its opposition; and WNYC filed a reply on December 4, 1972.

F.C.C. 73R-72

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of COLORADO WEST BROADCASTING, INC., GLENWOOD SPRINGS, COLO. GLENWOOD BROADCASTING, INC., GLENWOOD SPRINGS, COLO. For Construction Permits	Docket No. 19588 File No. BPH-7646 Docket No. 19589 File No. BPH-7707

MEMORANDUM OPINION AND ORDER

(Adopted February 7, 1973; Released February 9, 1973)

BY THE REVIEW BOARD: BOARD MEMBER KESSLER DISSENTING WITH RESPECT TO THE ADDITION OF THE SECTION 1.514(a).

1. The above-captioned, mutually exclusive applications for a new FM broadcast station, utilizing 92.7 MHz ch 224, at Glenwood Springs, Colorado, were designated for hearing on a standard comparative issue by Commission Order, FCC 72-836, released September 22, 1972, 37 FR 20276, published September 28, 1972. The Review Board now has before it Glenwood Broadcasting, Inc.'s (Glenwood) petition to enlarge issues, filed October 13, 1972, seeking addition of the following issues:[1]

a. To determine with respect to the application of Colorado West Broadcast, Inc. (hereinafter "Colorado West"), whether the staff proposed is adequate to effectuate its proposals.

b. To determine with respect to the application of Colorado West whether the proposed antenna and transmitter site is suitable for the proposed operation.

c. To determine with respect to the applicant's 45% stockholder, Mr. William R. Dunaway, whether Colorado West has submitted complete and accurate information in its application and has continued to keep the Commission advised of substantial and significant changes, as required by Section 1.65 of the Commission's Rules.

d. To determine with respect to the application of Colorado West

(1) The basis of the applicant's estimated costs of construction and operating expenses for the first year of operation.

(2) In light of the evidence adduced pursuant to Issues a, c, and d(1) above, whether the applicant is financially qualified.

e. To determine, on the basis of the foregoing, whether Colorado West possesses the requite qualifications to be a broadcast licensee.

2. *Adequacy of Staff Issue.* Glenwood notes that Colorado West proposes to broadcast 130 hours each week, of which 16.5% will be non-

[1] The Board also has before it an opposition to the petition to enlarge issues, filed November 3, 1972 by Colorado West Broadcasting, Inc.; comments filed by the Broadcast Bureau, November 3, 1972; a reply to the opposition, filed by Glenwood on November 13, 1972; and comments on reply to opposition, filed by Colorado West on January 4, 1973. In its reply Glenwood for the first time makes allegations of what it describes as a further violation of Section 1.65 of the Commission's Rules. Such new allegations are precluded by Section 1.45(b) of the Commission's Rules and will therefore not be considered. The comments on reply filed by Colorado West will be dismissed since such comments are not authorized by Section 1.45(c) of the Commission's Rules.

entertainment programming, and that Colorado West has only proposed three full-time employees and two part-time employees to operate its station. Furthermore, Glenwood notes that Colorado West has not proposed to include equipment for automated programming. Glenwood contends that it will be impossible for Colorado West to operate its proposed station with such a limited staff. In support of this contention, petitioner argues that three full-time employees will be required for announcing duties alone and that since Colorado West has not supplied work schedules or other information, it must be assumed that the two part-time employees will not be able to accomplish all of the other tasks which are necessary to successfully operate the station. Furthermore, Glenwood notes that Station KSNO, Aspen, Colorado, a daytime only station in which Mr. Dunaway, a 45% stockholder of Colorado West, is a 50% stockholder, has utilized four full-time employees, four part-time employees and relied upon the staff of the local newspaper for local news. In further support, Glenwood attaches an affidavit of the manager of its AM station to the effect that it takes a newsman two hours to produce a 15 minute college program.

3. The requested issue will be denied. The unsupported assertions of the petitioner do not comply with the specificity requirements of Section 1.229(c) of the Rules. Moreover, in its oppositions, Colorado West sets forth its proposed work schedules which, in view of its President's extensive participation, do not appear to be inherently unreasonable. See *Jay Sadow*, 27 FCC 2d 248, 20 RR 2d 1171 (1971), and cases cited therein.

4. *Site Suitability Issue.* In support of this issue, Glenwood points out that Colorado West's proposed transmitter and antenna site is adjacent to an abandoned ski lift and must be reached via a winding road in excess of one mile in length which will be unusable during winter because of the heavy snowfall. This allegation is supported by an unverified letter from the Mayor of Glenwood Springs advising the Commission that the access road is not kept open in winter and barely maintained in summer. In opposition, Colorado West avers that it has a number of different vehicles available to it which will make access to its site in all kinds of weather possible. The requested issue will be denied. The foregoing allegations do not raise sufficient questions as to the accessibility of Colorado West's proposed transmitter and antenna site to warrant an issue in this proceeding. See *Charles Vanda*, FCC 65R–65, 4 RR 2d 543, released February 18, 1965.

5. *Section 1.65 Issue.*[2] Glenwood bases its request for this issue upon the following facts which are not challenged by Colorado West. Colorado West proposes to rely upon William R. Dunaway for a substantial part of its financing. Dunaway's balance sheet, submitted with the Colorado West application, show assets exceeding $605,500.00, current liabilities of $20,000.00 and long term liabilities of $65,000.00. This representation, Glenwood contends, fails to show all of Dunaway's liabilities. Petitioner notes that Mountain States Communications, Inc. (Mountain States), of which Dunaway is president and 94.12% stockholder, tendered for filing, an application for a new standard broadcast

[2] While Glenwood requests a Rule 1.65 issue, the facts alleged concern a possible Rule 1.514 violation.

station at Steamboat Springs, Colorado, on December 12, 1969. That application has not been accepted for filing because of the AM freeze. Nevertheless, that applicant purports to rely on a $75,000 loan from William Dunaway. Thus, Glenwood contends, Dunaway's failure to show his obligation to lend $75,000 to Mountain States as a liability on the balance sheet tendered with the Colorado West application requires the inclusion of an issue in this proceeding. Moreover, it is conceded by Colorado West that on February 18, 1972, it filed an application for a new FM station at Steamboat Springs, and that the applicant in that case also proposed to rely upon Dunaway for a substantial part of its financing. The balance sheet submitted with that application did not show Dunaway's obligation to lend Mountain States $75,000 for its AM application. By letter of May 10, 1972, the Commission notified Colorado West that its application for Glenwood Springs should be amended to show Dunaway's and Curtis' obligations to finance the Steamboat Springs FM application. An amendment was filed reflecting Dunaway's and Curtis' obligation for the Steamboat Springs FM station but the Steamboat Springs AM obligation was not included. Glenwood also contends that since the application was filed, negotiable securities listed as current assets by Dunaway have substantially decreased in value and that failure to report this change is a violation of Section 1.65. In these circumstances, Glenwood contends, an issue against Colorado West is imperative.

6. The Review Board agrees with the Broadcast Bureau that a disqualification issue is not warranted in the circumstance of this case, but that Colorado West's failure to disclose Dunaway's obligation to finance the Steamboat Springs AM station should be considered in the comparative evaluation of the instant application. It is apparent from Dunaway's balance sheet that his liquid assets substantially exceed his current liabilities, including his $75,000 contingent loan obligation to Mountain States. In these circumstances we see no motive for the applicant to mislead the Commission. In its opposition Colorado West states by way of explanation for its failure to fully advise the Commission of Dunaway's obligation, that Dunaway was not fully familiar with Commission requirements and that because of personal problems of counsel for Colorado West, the necessity to include the $75,000 obligation in the Colorado West application was overlooked by the law firm handling the matter. Neither ignorance of Commission requirements nor failure by a lawyer to properly advise his client justifies failure to fully and fairly disclose all pertinent facts to the Commission. However, in this case, it does not appear that there was intent to mislead the Commission. Nor is the relatively modest fluctuation in value of stocks held by Dunaway required to be reported by Section 1.65 of the Commission's Rules.[3] Thus, an issue to determine the effect on Colorado West's comparative qualifications of its failure to disclose all of Dunaway's obligations will be included in this proceeding.[4]

7. *Estimated Construction and Operating Costs.* Glenwood questions the validity of Colorado West's projected construction and first year operating expenses. Particularly, Glenwood questions the adequacy of the $14,000 budgeted by Colorado West to meet pre-opera-

[3] *Mace Broadcasting Co.*, 25 FCC 2d 621 (1970).
[4] *Great Southern Broadcasting Co.*, 18 FCC 2d 599, 16 RR 2d 864 (1969).

tional expenses, including the expenses of the hearing. Furthermore, Glenwood contends that the $19,000 projected by Colorado West for salaries will be not sufficient to pay the five persons it proposes to employ. These contentions are not supported by affidavits of persons with knowledge of the facts or other evidence that Colorado West's proposals are not adequate. In these circumstances, the issue will not be added.[5]

8. IT IS ORDERED, That the petition to enlarge issues, filed October 13, 1972 by Glenwood Broadcasting, Inc. IS GRANTED to the extent indicated herein, and IS DENIED in all other respects; and

9. IT IS FURTHER ORDERED, That the issues in this proceeding are enlarged as follows:

To determine whether Colorado West Broadcasting, Inc. has failed to report requisite information in its application as required by Section 1.514(a) of the Commission's Rules; and, if so, to determine the effect thereof on its comparative qualification to be a Commission licensee.

10. IT IS FURTHER ORDERED, That the comments on reply to opposition, filed January 4, 1973, by Colorado West Broadcasting, Inc. ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[5] *United Televvision Co., Inc.*, 26 FCC 2d 1006, 1009 (1970).

F.C.C. 73–71

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Proposals by COLUMBIA PICTURES INDUSTRIES, INC. For Operational Fixed Station Facilities in the Business Radio Service	Files Nos. 18006–IB–22X, 26398–IB–52X, 26399–IB–52X, 26858/26859–IB–52X, 26400–IB–52X

JANUARY 17, 1973.

COLUMBIA PICTURES INDUSTRIES, INC.,
711 Fifth Avenue, New York, N.Y.

GENTLEMEN: We have before us for consideration the proposals of Columbia Pictures Industries, Inc., for operational fixed station facilities in the Business Radio Service. The systems requested would operate at Atlanta, Georgia (File No. 18006–IB–22X); Boston, Massachusetts (File No. 26398–IB–52X); Dallas, Texas (File No. 26399–IB–52X); Las Vegas, Nevada (File Nos. 26858/26859–IB–52X); and at New Orleans, Louisiana (File No. 26400–IB–52X).

With regard to the Atlanta application (File No. 18006–IB–22X), it is hereby dismissed as you requested in your letter of November 22, 1972.

As to the remaining applications, your proposal calls for 125 MHz of contiguous spectrum space. This requirement is, in part, dictated by the type of equipment you propose to use, but, further, by the type of communication services you plan to provide. In the latter connection, you propose to have available a five-channel video capacity. The primary use of these channels would be for the transmission of feature motion picture films for viewing, at rates established by you, by guests in "hotels" subscribing to your service. Two channels (the "Tele/Theatre" channels) would be dedicated to this undertaking. The third channel (the "Trailer" or "Promotional" channel) would be used to advise "hotel" guests of the movies available for their viewing and the starting times of each feature. The fourth channel (the "Tele/Ad" channel) would be employed to inform guests of subscribing "hotels" about things they could see and do in the city in which the system is located. While no charge to guests would be made for this service, advertising messages would be carried and a charge would be made to third-party advertisers for this service. Lastly, the fifth channel (the "Televention" channel) would be used for closed circuit network telecasting of conventions and meetings at participating hotels. While this service is also free to guests staying at the participating hotels, there would be a charge made by Columbia for the use of its facilities. This would be paid by the third-party "convention" or third-party sponsors

whose "messages" were carried under contractual arrangements with an operating subsidiary of your company.

Based on the showing you have made, we believe a partial grant of your applications can be made.[1] Accordingly, your applications will be granted to the extent they contemplate the use of the authorized facilities for the presentation of feature films (i.e., the proposed two Tele/Theatre channels). We also grant your applications to the further extent to permit the use of the authorized facilities to present a third channel for advising "hotel" guests of the movies available for them to watch and their starting times (i.e., the "Trailer" or "Promotional" channel).

We are not disposed, though, to permit the use of Business Radio facilities to carry messages of third-party advertisers (the Tele/Ad channel) or for "convention" coverage (the Televention channel). While we recognize these services were to be subordinate features of your proposed operation, and although they might be useful to the public, they represent a use of private microwave facilities in the Business Radio Service which we think is inconsistent with the purposes for which the Service was established.

In partially granting your applications, we wish to make clear such partial grants are subject to the outcome of the Notice of Inquiry and Notice of Proposed Rule Making we are today announcing, and to the further conditions as hereinafter set out.

These are the major points we feel we should touch on in passing on your applications. There are a number of technical matters to be worked out; but this can be done best at staff level. For this purpose, we are delegating to the Chief, Safety and Special Radio Services Bureau, the authority necessary to resolve these matters and, following such action, to issue the required authorizations for your operational fixed station facilities.

Accordingly, consistent with the views we have expressed above, the applications of Columbia Pictures Industries, Inc., for operational fixed stations at Boston, Massachusetts (File No. 26398–IB–52X); Dallas, Texas (File No. 26399–IB–52X); Las Vegas, Nevada (File Nos. 26858/26859–IB–52X); and New Orleans, Louisiana (File No. 26400–IB–52X) are granted, subject to the following terms and conditions:

(1) That the grant of the above-referenced applications, or any proposals of the same class which may be subsequently filed by Columbia Pictures Industries, Inc., shall be subject to such determinations as may be made by the Commission in its inquiry and rule-making proceeding in Docket No. 19671.

(2) That pending decision in Docket No. 19671, Columbia Pictures Industries, Inc., shall utilize its authorized microwave facilities:

(a) Only to transmit feature films; and, without charge to any party, program material which may be of general interest to visitors in the areas in which its systems operate; and, also without charge to any party, pro-

[1] A number of questions are raised by your proposed operation. You have asserted eligibility in the Business Radio Service; and although the regulations governing eligibility are very broad (see Sections 91.551 and 91.552 of our Rules), we have some doubt whether the Business Radio Service should continue to be used for the type of service you propose. We also note the substantial spectrum space for which your applications call, and the possible impact of the assignment of such substantial spectrum space on the availability of frequencies in this range to other eligibles entitled to use them. While these questions do not require denial of your applications, we are instituting on this date a Notice of Inquiry and Notice of Proposed Rule Making in Docket 19671, covering in part the aforementioned issues.

gram material reasonably related to the subject business undertaking of the licensee, such as "trailers," previews of feature motion pictures, and scheduling information.

(b) Only to transmit the foregoing program material to "guests" in "hotels" served by the licensee.

(3) That, in any one area, the licensee, Columbia Pictures Industries, Inc., shall be granted no more than three video channels for the transmission of its program material and entertainment features, i.e., two channels for feature motion picture films and a third channel for promotional and related purposes, as defined above.

(4) That the facilities authorized to Columbia Pictures Industries, Inc., are not employed to carry advertising messages of third parties; or for providing "convention" coverage; or for the transmission of any messages, programs, or presentations of any kind for any third party for any consideration whatsoever, except as provided above.

(5) That any technical matters with respect to any applications of Columbia Pictures Industries, Inc., for facilities of the class described, above, are resolved satisfactorily by the staff acting in accordance with the delegation hereinafter made.

In connection with the pending applications of Columbia Pictures Industries, Inc., the Chief, Safety and Special Radio Services Bureau, is hereby delegated authority to issue licenses for the facilities requested by the applicant, in accordance with the foregoing terms and conditions, upon a satisfactory showing by the applicant that its proposals meet engineering and technical requirements of the rules governing the authorization and use of operational fixed stations in the Safety and Special Radio Services.

Further, the Chief, Safety and Special Radio Services Bureau, may authorize the use of transmitting equipment for use in the systems proposed here, where such equipment meets the technical standards set forth in Part 91 of the Rules; and further, may act on such additional applications as may be submitted by Columbia Pictures Industries, Inc., for similar facilities in the Business Radio Service, where any such requested authorization issued is, in substance, made subject to the foregoing terms and conditions.

Should the foregoing actions not be acceptable to you, that fact should be made known to the Commission, together with a full statement of reasons for finding them unacceptable. Such notice shall be given not later than thirty days following the issuance of any license to you for the facilities you have applied for.

Commissioners Johnson, Reid and Wiley concurring in the result.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

F.C.C. 73-143

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of EASTERN MICROWAVE, INC. For Construction Permits in the Domestic Public Point-to-Point Microwave Radio Service for a New Station at Spafford Hill, New York and for Modification of Stations KEM36 and KEM59 at Hatch Hill and Sentinel Heights, N.Y.	File Nos. 3746-C1-P-67, 3597 and 3598-C1-P-68

MEMORANDUM OPINION AND ORDER

(Adopted February 7, 1973; Released February 9, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT; COMMISSIONER H. REX LEE ABSENT.

1. The Commission has before it the above captioned applications of Eastern Microwave, Inc. (Eastern) which were filed on March 20, 1967, and January 16, 1968. A Petition to Deny was filed on February 28, 1968 by Channel 9 Syracuse, Inc. (Channel 9), licensee of WNYS-TV, Syracuse, New York. Responsive pleadings were subsequently filed by applicant and petitioner.

2. Eastern proposes to modify stations KEM36 and KEM59 and construct a new station at Spafford Hill, New York, for the purpose of relaying the signal of CKWS-TV (Kingston, Ontario) to Auburn Cablevision Corporation, Auburn, New York. Pursuant to Section 76.65 of our Rules, no Certificate of Compliance is required for Auburn Cablevision to carry this signal.[1]

3. In its petition to deny, Channel 9 contends that a grant of these applications would not serve the public interest because: (a) cable television would have an adverse competitive impact on local broadcasting; and (b) the Commission has not resolved in the "Syracuse Television Top 100 Market Study" [2] the effects of the concentration of control of the S. I. Newhouse family over mass communications in the Syracuse area (Auburn is some 22 miles west of Syracuse). Eastern answered that the Commission settled all public interest questions by granting its earlier applications to serve Auburn, New York, in *Unicable, Incorporated, et al.*, 6 FCC 2d 771 (1967). Eastern further argues

[1] In *Unicable Incorporated, et al.*, 6 FCC 2d 772 (1967) we waived Section 74.1107 of the rules to allow General Electric Cablevision Corp., Auburn, N.Y., to carry the CKWS-TV signal. Auburn Cablevision has been carrying this signal off the air since 1967. Such carriage by Auburn Cablevision is consistent with the policy expressed in *Suffolk Cable Corporation*, 18 FCC 2d 626 (1968).

[2] By *Memorandum Opinion and Order* (FCC 72R-217) released August 10, 1972, the Review Board terminated the hearing and dismissed as moot the pending CATV petitions because they were not supplemented to demonstrate their relevance to the *Cable Television Report and Order*, 36 FCC 2d 143 (1972).

that the concentration of control issue is irrelevant because its applications to serve Auburn were not included in the "Syracuse Television Top 100 Market Study", and Auburn Cablevision is an unaffiliated customer.

4. In our *Cable Television Report and Order*, *supra*, we adopted rules concerning "distant" signal carriage, taking into account the competitive impact on local broadcasting. Auburn Cablevision is in compliance with these rules. Since Channel 9 did not supplement its petition to demonstrate its relevance to our new cable rules, the issue of the competitive impact of cable television on local broadcasting appears to be moot.

5. With regard to the concentration of control of the mass media question raised by the petitioner, we do note that the S. I. Newhouse family, which owns Eastern, also controls a number of mass media outlets in the Syracuse, New York area.[3] The Commission has, of course, been interested in the concentration of the mass media. We have, within the last two years or so, promulgated rules limiting cross ownership of television stations, CATV systems and AM/FM stations in the same city. We are currently considering further restrictions to include common ownership of newspapers and broadcast stations in the same community (see *Further Notice of Proposed Rulemaking* in Docket No. 18110, 22 FCC 2d 339). While we have inquired into CATV-common carrier ownership patterns,[4] we have made no determination that cross ownership between mass media owners and common carriers could have, in general, an adverse effect on the public interest. Primarily, this is because common carriers, unlike mass media operators, have no control over the intelligence being transmitted. But where such a concentration may involve any conflicts of interest which would adversely affect the reliability, effectiveness or reasonableness of the proposed common carrier service, the Commission would be concerned. *Alabama Microwave, Inc.*, 23 FCC 2d 792 (1970).[5] Having analyzed the proposed service under this latter standard, we are unable to perceive, nor has the petitioner alleged, any circumstances under which Eastern would likely be subject to any substantive conflict of interest because of its Newhouse ownership.

6. In view of the foregoing, we find that the instant proposed facilities would serve the public interest, convenience and necessity and that Eastern Microwave, Inc. is technically, financially and otherwise qualified to construct and operate them.

7. Accordingly, IT IS HEREBY ORDERED, That the captioned applications ARE GRANTED.

8. IT IS FURTHER ORDERED, That the aforementioned petition to deny IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[3] Newhouse controls several broadcasting facilities (WSYR–TV, WSYR–FM and WSYR–AM) and two daily newspapers in Syracuse and several CATV systems in the general area.

[4] See Notice of Proposed Rule Making and Inquiry in Docket No. 18891, 23 FCC 2d 833.

[5] Enlargement of issue decision. Review Board decision on competing applications is currently under review.

F.C.C. 73–105

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
ACCURACY IN MEDIA, INC. ON BEHALF OF
MARILYN DESAULNIERS
Concerning Fairness Doctrine Re Public
Broadcasting Service

JANUARY 23, 1973.

ACCURACY IN MEDIA, INC.,
501 13th Street, NW.,
Washington, D.C.

Attention: Abraham Kalish, Executive Secretary.

GENTLEMEN: This will refer to the complaint of Accuracy in Media, Inc. (AIM) on behalf of Mrs. Marilyn Desaulniers against the Public Broadcasting Service (PBS) concerning the program "the three r's . . . and sex education" and the complaint of AIM against PBS concerning the program "Justice?".

Both of the above complaints were based on Section 396(g)(1)(A) of the Communications Act of 1934, as amended, and the fairness doctrine.

In regard to the program "the three r's . . . and sex education," AIM contends that PBS violated the fairness doctrine by presenting only a narrow range of contrasting views and that, while the statement was not broadcast, the precise description of the program which prefaced the NET transcript stated that the program examined "sex education in the schools from all points of view." AIM requests that the Commission require PBS to broadcast a program which informs the public about the intelligent and responsible criticisms of sex education programs and determine whether the broadcast of the program was in violation of Section 396(g)(1)(A) of the Communications Act.

The response of PBS to the complaint concerning the program "the three r's . . . and sex education" states that the fairness doctrine does not require quasi-mathematical equality or "balance", but only a "reasonable opportunity" for the presentation of contrasting viewpoints; that the judgment in this regard is that of the licensee; and that where the licensee has acted reasonably or in good faith, neither the Commission nor any outside party may substitute its judgment for that of the licensee. PBS further contends that the program did provide a reasonable opportunity for the presentation of contrasting viewpoints; that while AIM objects to the manner in which opponents of sex education were presented, this is an impermissible intrusion on the journalistic judgment of the broadcaster; that in regard to AIM's objection that the program failed to present certain specific spokesmen who could have best stated the case against sex education, the selection

of spokesmen is the responsibility of the licensee; and that in regard to the contention of AIM that the program contained errors of fact, in the absence of substantial extrinsic evidence of deliberate distortion or slanting, the Commission has often stated that it will make no inquiry into allegations of biased, distorted or incomplete reporting, and no such evidence has been presented. PBS further states that it appreciates interest in and suggestions regarding the network's programming, and that "To the extent that they constitute criticism of our programming in the artistic sense of the word, they are welcome. However, to the extent that criticism becomes an effort to prescribe or proscribe program content, it represents an impermissible intrusion on the good faith of the broadcaster, which is not welcome and which should not be sanctioned."

The reply of AIM to the response of PBS concerning the program "the three r's . . . and sex education" states that the fairness doctrine demands not merely the presentation of "significant contrasting viewpoints," but the presentation of the contrasting views of all responsible elements without bias; that significant contrasting views of very important and responsible elements in the community were excluded from this program, and PBS has presented no evidence that these views have been aired on other PBS programs; that the failure of PBS to provide opportunity for expression of significant views of responsible elements in the community in the sex education controversy clearly violates the letter and spirit of the fairness doctrine; that even in its presentation of some contrasting views PBS appears to have stacked the cards deliberately to present a weak case against sex education programs and a strong case in favor of them; that the Commission should remind PBS that with regard to the need for extrinsic evidence prior to probing charges of distortion in news reporting, these rulings by the Commission were not a license to broadcasters to deliberately distort the facts or operate with such carelessness that the public was misled with respect to important facts; and that licensees have an obligation to welcome and be responsive to criticism from listeners and viewers.

The further response of PBS to the reply of AIM concerning "the three r's and sex education" states that PBS is not "lacking in concern about the accuracy of statements made over the air and [rejecting] the rights of members of the viewing audience to criticize program content", a position which AIM attempts to characterize PBS as having taken; that PBS considers itself very receptive to criticism and suggestions from the public; and that PBS and the organizations which produce programs for national distribution by PBS appreciate input from the public, but that PBS rejects what it terms AIM's effort to dictate programming content and to force PBS or a production organization such as NET to tailor its programming to suit AIM's point of view.

With respect to the program "Justice?", AIM contends that "While the program purported to be a study of the rehabilitation of prisoners, it barely mentioned that subject. It was concerned almost exclusively with a one-sided and essentially false presentation of the cases of Angela Davis and the so-called Soledad brothers." AIM states that it inquired of PBS whether it had provided the stations it serves with

material that would provide balance to what AIM believed to have been a clearly one-sided presentation of "Justice?" and that PBS cited ten programs distributed by it in 1971 that dealt with legal or prison topics, but that none of these programs dealt with the principal topics covered in "Justice?" and could not be properly cited as balancing items for "Justice?". AIM requests that the Commission direct PBS to:

> (1) "Withdraw the program "Justice?" from use on the grounds that it violates the objectivity requirements of the Public Broadcasting Act; (2) Present to its viewers a program that devotes one hour to the presentation of the other side of the Angela Davis and Soledad Brothers cases. Since a one-sided broadcast has already been presented, the balancing program should give equal time to the other side and should not itself be a presentation of contrasting points of view. PBS stations should be required to show this program in the same time period and for as many times as they aired "Justice?"; (3) Refrain in the future from distribution of blatantly one-sided and propagandistic programs that clearly violate the mandate of Congress in Section 396(g)(1)(A) of the Public Broadcasting Act."

PBS, in response to the complaint concerning the program "Justice?", states that the controversial issue of public importance with which the program dealt was the functioning of this country's law enforcement system, including the courts and prisons; that the program "Justice?" was announced to the member stations as "one discussing whether blacks can receive true justice in the American Courts, prisons or in post-prison life" and that "this program examined the American judicial system from a black perspective. . . . The general issues of law enforcement and the legal process, including penology and its problems, have been the subject of a wide variety of PBS-offered programming from diverse sources during 1971." PBS further states that a series of ten programs described in a previous letter to AIM was only a partial list indicating the depth of PBS programming on this subject; that AIM has not shown why the programs listed in the letter taken together with "Justice?" do not represent a balanced presentation of the issue involved; that the allegations of AIM are bare and unsupported; that AIM fails to comply with the fourth requirement of the fairness primer that the complainant set forth "the basis for the claim that the station has presented only one side of the question"; that AIM attempts to limit consideration of the numerous programs dealing with the issues tendered by the "Justice?" program by suggesting that six of the programs listed cannot be considered because they were either internally balanced or were intended to balance a program other than "Justice?" and that this is a simplistic approach not countenanced by the fairness doctrine; that a determination of fairness must be based upon a consideration of all programs; that AIM seeks mathematical equality; and that the fairness doctrine requires substantial fairness and balance, not precise equality, and that this has been achieved. PBS further contends that what AIM is complaining about is that more programming should have been devoted to the specific issue of the Angela Davis and the Soledad Brothers cases, but that these cases were simply a part of an overall discussion of justice and prisons—a subject which was treated fully and fairly throughout the series of programs referred to; that AIM is attempting to impose its editorial views as to the subjects that should be covered, the empha-

sis to be employed and the manner in which the subject matter should be handled, and that this is the responsibility of the broadcaster and not of the critics; and that since AIM has not made out a prima facie case, the complaint should be dismissed on the basis of the material AIM has submitted.

The reply of AIM to the response of PBS concerning the program "Justice?" states that PBS does not dispute AIM's contention that this program itself was completely one-sided and lacking in balance; that the only question is whether PBS has produced and caused to be broadcast other programs dealing with the same issues as the program "Justice?" in which there was an adequate presentation of contrasting viewpoints on these issues in a manner that would balance the one-sidedness of "Justice?"; that while PBS lists ten programs "dealing with the complex issues of law enforcement, the courts and prisons," PBS does not demonstrate that any of these programs presented a discussion of the specific controversial issues involved in "Justice?" in a way that brought out viewpoints that contrasted with the views expressed in "Justice?"; and that PBS takes the position that "Justice?" dealt only with the issue of "the functioning of this country's law enforcement system, including courts and prisons" and asserts that any program dealing with or touching upon this broad topic deals with the same matter covered by the controversial program "Justice?" AIM further states that PBS admits that "Justice?" was advertised to the member stations as a program "discussing whether blacks can receive true justice in the American courts, prisons or in post-prison life"; that on the broadcast itself the announcer said "It is an attempt to find out what the penal institutions and correctional system as an institution are doing to rehabilitate those that society has judged to be wrong"; and that by PBS's own descriptions the program clearly dealt with a narrow segment of the broad area of law enforcement and purported to address itself to very specific and limited issues. AIM further contends that the fact that "Justice?" dealt with legal problems and the other programs cited by PBS also dealt with legal problems does not mean that all of these programs dealt with the same problems and issues, and in fact they did not; that the controversial issues of public importance involved in this program were actually quite different from the issue stated by PBS in the program itself; that about three-fifths of the program that was supposed to deal with rehabilitation of prisoners dealt with Angela Davis, George Jackson, Jonathan Jackson, and the case of the Soledad Brothers; that what the audience received was a heavy dose of praise for the above persons; that while the introduction states that the program is an effort to find out what the system is doing to rehabilitate prisoners, the conclusion states that, for anyone, time in prison is an endless nightmare and for black people it is that and more, and thus it concludes that it is the condition inside prisons that needs the most correction; that PBS has not shown that the highly controversial cases of Angela Davis and the Soledad Brothers have been discussed on its programs from the point of view of presenting the case that there is strong evidence that these individuals committed heinous crimes and that they would be guaranteed fair trials under American judicial procedures; that PBS has not shown that it has programmed any

discussion of prison problems which shows the positive efforts that are being made to make life for the prisoners less of a nightmare and to encourage their rehabilitation; that there is no evidence that PBS has presented any discussion with guards and prison officials that would give the other side of the story in the case of the prisoners on "Justice?" who alleged serious mistreatment; that when AIM requested to see the PBS screening report on "Justice?" to determine what recommendation had been made with respect to the problem of lack of balance in the program, it was denied access to the report.

The further response of PBS to the reply of AIM concerning "Justice?" states that AIM does not face the issue of whether the complaint should be dismissed since no prima facie case was made that the fairness doctrine was violated; that AIM fragmentizes the program by listing at least 12 different subjects of controversy and characterizing the list as only some of the controversial issues contained in the program; that AIM asks the Commission to undertake a line-by-line content analysis of the program; that PBS made it clear that the general issues covered by "Justice?" related to the issues of law enforcement and the legal process which have been the subject of a wide variety of programs; that the fairness doctrine does not require that balance be achieved within each program or each segment of a program; and that the fairness doctrine insists on fairness and balance on an overall schedule basis and that AIM has made no prima facie case that this obligation has not been met.

The Commission received a further response from PBS concerning "Justice?" on August 24, 1972 which stated that PBS had continued to offer diverse programming dealing with law enforcement and justice and listed several programs broadcast during 1971 which were omitted from its previous responses to the Commission. PBS stated that on April 21, 1971 it distributed a series of four 90-minute programs entitled "Trial" that dealt in detail with the administration of justice where a black defendant was involved, and that all points of view, including those of law enforcement officials, were presented. PBS also listed seven other programs or series of programs broadcast during 1971 and 1972 dealing with law enforcement and justice. PBS further stated that it anticipated distributing a program in early September 1972 containing a discussion of the New York Commission's investigation of the riots at the Attica State Prison and reiterated that "So long as the issue of law enforcement remains important, public broadcasting will continue to offer diverse and significant programming dealing with it."

DISCUSSION

The fairness doctrine provides [1] that if a station presents one side of a controversial issue of public important, it is required to afford rea-

[1] As we noted earlier, both complaints also asked the Commission to find that the broadcasts complained of violated Section 396(g)(1)(A) of the Communications Act, which authorizes the Corporation for Public Broadcasting to facilitate the full development of educational broadcasting in which programs of high quality will be made available to stations from diverse sources "with strict adherence to objectivity and balance in all programs or series of programs of a controversial nature." We are ruling upon the gravamen of the AIM complaints under the standards of the fairness doctrine. AIM has not given us the benefit of its views as to the Commission's jurisdiction with respect to Section 396, i.e., was the section intended by Congress to set forth a specific standard

sonable opportunity for the presentation of contrasting views. The broadcast licensee has an affirmative duty to encourage and implement the broadcast of contrasting views in its overall programming. Both sides need not be given in a single broadcast or series of broadcasts, and no particular person or group is entitled to appear on the station, since it is the right of the public to be informed which the fairness doctrine is designed to assure, rather than the right of any individual to broadcast his views.

With regard to the program "the three r's . . . and sex education," it appears that the program afforded a reasonable opportunity for the presentation of significant contrasting views. The program presented spokesmen who broadcast various views both for and against sex education. You contend that the viewpoint of particular experts was not presented. However, as indicated above, the selection of spokesmen is entirely within the discretion of the licensee and there is no evidence to indicate that PBS acted unreasonably. You also allege that PBS appears to have stacked the cards deliberately to present a weak case against sex education by failing to present spokesmen better able to state the case of those opposed to sex education and, thus, mislead the public with respect to important facts.[2] In the absence of extrinsic evidence of rigging or slanting the Commission will not make inquiry into such allegations. See *Letter to Mrs. Paul*, 26 F.C.C. 2d 591 (1969).

Concerning the program "Justice?" it should be pointed out that the fairness doctrine does not require a line by line analysis and balance as to every statement made in discussing a controversial issue of public importance. In this connection, the Commission in *National Broadcasting Co.* (AOPA complaint), 25 FCC 2d 735 (1970), at 736 stated:

"First, the fairness doctrine requires reasonable opportunity for the discussion of conflicting viewpoints on issues of public importance (Section 315(a)). As the Bureau correctly noted, this does not mean that balance may '. . . be required as to every statement or assertion made in discussing a controversial issue.' Clearly the licensee must be given considerable leeway for exercising reasonable judgment as to what statements or shades of opinion do require offsetting presentation. If every statement, or inference from statements or presentations, could be made the subject of a separate and distinct fairness requirement, the doctrine would be unworkable. More important, as we have pointed up recently in an analogous situation (Memorandum Opinion and Order, FCC 70–881, par. 24), such a policy of requiring fairness on each statement or inference from statements would involve this agency much too deeply in broadcast journalism. We could become an integral part of broadcast journalism, passing on thousands of complaints that some statement, or inference to be drawn from a statement, on a newscast or other news show had not been offset by a countering presentation. A policy of requiring fairness, statement by statement or inference by inference, with constant Governmental intervention to try to implement the policy,

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subject to administrative enforcement rather than merely a general enunciation of the Corporation's functions, or on the further question of how such a standard, if one was intended, differs from that of Section 315 and the fairness doctrine. Nor do we have the views of the Corporation on these issues. We believe that this is an area of considerable doubt, particularly in light of the caution in Section 398 that nothing in Part IV of the Act should be deemed to authorize any department, agency, officer or employee of the United States to exercise any direction, supervision or control over the Corporation. In view of these considerations and the fact that we have fully considered the complaints under well-established fairness doctrine principles applicable to all broadcast licensees, we have refrained from attempting to reach a separate conclusion under Section 396. If AIM or other interested party believes that this issue should be explored further, we will entertain memoranda or briefs directed to it within 30 days, with leave to reply within 20 days after that period.

[2] The spokesmen included Clergymen, parents, and children against sex education.

109–027—73——4

would simply be inconsistent with the profound national commitment to the principle that debate on public issues should be 'uninhibited, robust, wide-open' (*New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270)."

PBS admits that the program "Justice?" was announced to the member stations as one discussing whether blacks can receive true justice in American courts, prisons, or post-prison life and does not deny that on the broadcast itself the announcer described the program as "an attempt to find out what the penal institutions and correctional system as an institution are doing to rehabilitate those that society has judged to be wrong"; however, PBS asserts that the controversial issue of public importance with which the program dealt was the functioning of this country's law enforcement system, including the courts and prisons, and cites a series of 18 programs concerning the general issues of law enforcement and the legal process, including penology and its problems. The programs cited by PBS included programs involving such questions as whether governors should be given final veto power over federally funded legal service programs within their states, whether J. Edgar Hoover should have been replaced, whether states should adopt a preventive detention statute, whether a state should negotiate with prisoners for the release of hostages and whether courts should be able to admit evidence police have seized illegally.

It appears that the program "Justice?" presented one side of the controversial issues of "whether blacks can receive true justice in the American courts, prisons or in post-prison life" and "what the penal institutions and correctional system as an institution are doing to rehabilitate those that society has judged to be wrong." These two issues are, of course, part of the general subject of the functioning of this country's law enforcement system, but they are also independently significant as controversial issues and PBS has not denied that "Justice?" presented one side of these issues.

It further appears that the "Trial" series of four programs distributed by PBS on April 21, 1971 provided a reasonable opportunity for the presentation of contrasting views on the issue of "whether blacks can receive true justice in the American courts, prisons or in post-prison life" since that program dealt in detail with the administration of justice where a black defendant was involved and all points of view, including those of law enforcement officials, were presented.

With regard to the issue of "what the penal institutions and the correctional system as an institution are doing to rehabilitate those that society has judged to be wrong" PBS distributed a 90-minute program to its member stations on September 13, 1972, entitled "Attica—The Official Report of the New York State Special Commission." Since PBS advised the Commission that it planned to present this program as part of its continuing coverage of the functioning of this country's law enforcement system, the program was viewed by members of the Commission's staff. While the program centered on the New York State Special Commission's investigation of the riots at Attica State Prison and its conclusions, contrasting points of view concerning prison and prisoner reform, including the views of a substantial number of law enforcement officials, were presented.

In view of the foregoing, it does not appear that further Commission action is warranted at this time. The Commission's role is to determine

whether the licensee or network can be said to have acted reasonably and in good faith and the Commission has stated that the "critical issue is whether the sum total of the licensee's efforts, taking into account his plans when the issue is a continuing one, can be said to constitute a reasonable opportunity to inform the public on the contrasting viewpoints—one that is fair in the circumstances." *Committee for the Fair Broadcasting of Controversial Issues*, 25 FCC 2d 283, 295 (1970). Furthermore, "It is clear that in the context of continuing issues the fairness doctrine does not require a response to an individual speech or presentation, but only a reasonable opportunity over a reasonable period of time." *Letter to Eugene J. McMahon, Esq. and John Nappi, Esquire*, dated August 22, 1972 (———F.C.C. 2d———).

Accordingly, on the basis of the information before it at the present time, the Commission cannot conclude that PBS has acted unreasonably or in bad faith in fulfilling its obligations under the fairness doctrine.

Commissioner Johnson concurring in the result.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

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Accordingly, on the basis of the information before it at the present time, the Commission cannot conclude that PBS has acted unreasonably or in bad faith in fulfilling its obligations under the fairness doctrine.

Commissioner Johnson concurring in the result.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
MRS. ESTELLE L. MILLER, COLUMBUS, GA.
Concerning Fairness Doctrine Re Television Station WTVM

FEBRUARY 5, 1973.

MRS. ESTELLE L. MILLER,
627 Westmoreland Road,
Columbus, Ga.

DEAR MRS. MILLER: This letter will refer to your January 12, 1972 fairness complaint against Television Station WTVM, Columbus, Ga. We regret that we are only now able to respond to your complaint but because the limited staff was for many months swamped with complaints and inquiries related to the 1972 primaries, conventions and general elections, which would have become moot unless resolved at once, it was necessary to postpone consideration of this complaint.

In your complaint of January 12, 1972 you allege that as a resident of Columbus, Georgia and as a member of Citizens Against Forced Busing (hereinafter CAFB), you are concerned about WTVM's coverage of Muscogee County School Board's implementation of the U.S. Fifth Circuit Court of Appeals order requiring busing to achieve racial balance; that the station broadcast two interviews with Dr. H. W. Shaw, the Superintendent of Schools, one on July 30, 1971 for 30 minutes, and another on August 1, 1971 for an hour, which presented the School Board's side of the issue and has failed to afford you or your organization a reasonable opportunity to present contrasting views; that, in addition, WTVM broadcast two newscasts on January 5, 1972 and one newscast on January 6, 1972 which gave the impression that CAFB's opposition to the busing issue had subsided, when in fact you state "nothing could be further from the truth"; and that you believe the station supports the position taken by Dr. Shaw and the School Board.

In WTVM's January 30, 1972 response it states that you were afforded an opportunity to respond to the January 5th and 6th, 1972 newscasts, and that you appeared on the 6:00 p.m. and 11:00 p.m. newscast on January 14, 1972; that shortly after Dr. Shaw's July 30, 1971 appearance you were afforded an opportunity and did appear on a similar show; that Dr. Shaw's August 1, 1971 appearance was for the purpose of informing the public of the meaning of the Fifth Circuit Court's decision and was not intended as the station's views on the issues; and that the station admits a controversial issue of public importance exits but that it feels it has, through its overall programming, presented contrasting views.

You replied to WTVM's January 30, 1972 letter on February 8, 1972 stating that you felt the station had not "lived up to its affirmative duty to encourage and implement the broadcast of contrasting views in its overall programming" because it had not "sought-out" contrasting views but only broadcast contrasting views when approached by the CAFB; that the station made it appear that the Fifth Circuit Court of Appeals ordered the busing, when in fact their decision only ordered further desegregation and it was the School Board who decided to use forced busing as a means of achieving further desegregation.

The station again responded by letter dated March 17, 1972 stating that both the July 30 and August 1, 1971 appearances by Dr. Shaw were designed to inform the public on how the School Board planned to implement the Fifth Circuit order, and that it did not intend these broadcasts to be an expression of its position on the matter; that the newscasts of January 5 and 6, 1972 were designed to appraise the School Board's and CAFB's position after four months and, at any rate, you appeared on the January 14, 1972 newscast to present your views. The station further lists 32 separate newscasts broadcast from August 1, 1971 to February 28, 1972 which reflect views opposed to "forced busing", with 19 of these newscasts making specific reference to CAFB or to your opposition to forced busing. In addition, WTVM states that it is affiliated with ABC, which has covered both sides of the controversy surrounding the use of busing to achieve racial balance through ABC's nightly newscasts and interviews with spokesmen for both sides of the issue on the Sunday "Issues and Answers" program.

The selection and presentation of specific program material are responsibilities of the station licensee, and under the provisions of Section 326 of the Communications Act the Commission is specifically prohibited from censoring broadcast material.

However, if a station presents one side of a controversial issue of public importance, it is required to afford reasonable opportunity for the presentation of contrasting views. This policy, known as the fairness doctrine, does not require that "equal time" be afforded for each side, as would be the case if a political candidate appeared on the air during his campaign. Instead, the broadcast licensee has an affirmative duty to encourage and implement the broadcast of contrasting views in its overall programming which, of course, includes statements or actions reported on news programs. Thus, both sides need not be given in a single broadcast or series of broadcasts, and no particular person or group is entitled to appear on the station, since it is the right of the public to be informed which the fairness doctrine is designed to assure rather than the right of any individual to broadcast his views. It is the responsibility of the broadcast licensee to determine whether a controversial issue of public importance has been presented and, if so, how best to present contrasting views on the issue. The Commission will review complaints to determine whether the licensee can be said to have acted reasonably and in good faith.

With respect to the accuracy of program material or allegations that a network, station or newscaster has distorted news or has staged or fabricated news occurrences, the Commission's policy in this area is set forth in its *Letter to Mrs. J. R. Paul*, 26 F.C.C. 2d 591 (1969), a copy of which is enclosed. As you will note, the Commission believes

that it, as the governmental licensing agency, should not attempt to determine the "truth" of a given situation and whether a news report has given the "truth." Rather, it will take action in such cases only when it has substantial extrinsic evidence that the licensee has deliberately distorted its news reports or staged news events.

The busing issue is admittedly a controversial issue of public importance which requires the licensee to afford reasonable opportunities for the presentation of contrasting views. You allege that the station has violated the fairness doctrine by affording more coverage to the School Board's side of the issue, by not making enough time available for opposing views and by failing to encourage other contrasting views on the issue involved. The station, on the other hand, states that it has afforded reasonable opportunities to you to present contrasting views, evidenced by your appearance on the 14th of January and through news coverage of CAFB's continuing opposition to the forced busing. In addition, the station submitted evidence that on 19 different occasions over a 7-month period you or CAFB were specifically mentioned as being opposed to the School Board's implementation of the busing order sent down by the Fifth Circuit Court of Appeals. It therefore cannot be said that WTVM acted unreasonably in regard to the coverage of the views espoused by either the School Board or the Citizens Against Forced Busing, and no further Commission action is warranted.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division
for Chief, Broadcast Bureau.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
MRS. V. E. MINHINNETTE, BATON ROUGE, LA.
Concerning Fairness Doctrine Re Station
WJBO

FEBRUARY 5, 1973.

MRS. V. E. MINHINNETTE,
10688 Ranchwood Drive,
Baton Rouge, La.

DEAR MRS. MINHINNETTE: This letter will refer to your March 22, 1972 complaint against Radio Station WJBO, Baton Rouge, Louisiana. We regret we are only now able to respond to your letter but because the staff was for many months swamped with complaints and inquiries related to the 1972 primaries, conventions and general elections, which would have become moot unless they were resolved at once, it was necessary to postpone consideration of many complaints. You state that WJBO's TOPIC program broadcast an interview with a representative of the National Organization of Women (NOW), who spoke in favor of the Equal Rights Amendment for women, and that as spokeswoman for Females Opposed to Equality (FOE), you requested an opportunity to present contrasting views. The station denied your request alluding to the local status of your organization and stated its preference for having contrasting views presented by a representative of a nationally recognized organization. In addition, the station stated that it had selected the Honorable Ms. Louise Johnson, a Louisiana Legislator, to present contrasting views on the issues surrounding the Equal Rights Amendment on its May 8, 1972 TOPIC program.

In reply to the station's response, you indicated that the spokeswoman selected by the station was not a member of any organization which opposed the Equal Rights Amendment, and renewed your request for an opportunity to present contrasting views in light of the new national status of your organization.

The selection and presentation of specific program material are responsibilities of the station licensee, and under the provisions of Section 326 of the Communications Act the Commission is specifically prohibited from censoring broadcast material.

However, if a station presents one side of a controversial issue of public importance, it is required to afford reasonable opportunity for the presentation of contrasting views. This policy, known as the fairness doctrine, does not require that "equal time" be afforded for each side, as would be the case if a political candidate appeared on the air during his campaign. Instead, the broadcast licensee has an affirmative

duty to encourage and implement the broadcast of contrasting views in its overall programming which, of course, includes statements or actions reported on news programs. Thus, both sides need not be given in a single broadcast or series of broadcasts, and no particular person or group is entitled to appear on the station, since it is the right of the public to be informed which the fairness doctrine is designed to assure rather than the right of any individual to broadcast his views. It is the responsibility of the broadcast licensee to determine whether a controversial issue of public importance has been presented and, if so, how best to present contrasting views on the issue. The Commission will review complaints to determine whether the licensee can be said to have acted reasonably and in good faith. For your further information, we are enclosing a copy of the Commission's Public Notice of July 1, 1964, entitled "Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance."

Where complaint is made to the Commission, the Commission expects a complainant to submit specific information indicating the basis for the claim that the station or network broadcast only one side of the issue in its overall programming and whether the station or network has afforded, or has expressed an intention to afford, reasonable opportunity for the presentation of contrasting viewpoints on that issue. From the information before the Commission, it appears that the licensee expressed an intention to afford Ms. Johnson an opportunity to present contrasting views on the Equal Rights Amendment. Thus, it cannot be concluded that WJBO has failed to afford reasonable opportunities for the presentation of conflicting views regarding the matters raised in your letter. A licensee has considerable discretion as to the format devoted to issues of public importance, including selection of the spokesman or spokeswoman for each point of view. You have not provided sufficient information setting forth reasonable grounds for your conclusion that the licensee has failed in its overall programming to present opposing views on the issues about which you are concerned. *Allen C. Phelps*, 21 F.C.C. 2d 12, 13 (1969).

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief*,
Complaints and Compliance Division
for Chief, Broadcast Bureau.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION
Concerning Fairness Doctrine Re CBS Network

FEBRUARY 5, 1973.

Mr. EDWARD R. GARVEY,
Executive Director, National Football League Players Association, 1300 Connecticut Avenue NW., Washington, D.C.

DEAR MR. GARVEY: This refers to the complaint filed with the Commission January 8, 1973, on behalf of the National Football League Players Association (NFLPA) against the Columbia Broadcasting System Television Network (CBS), and its owned-and-operated stations and affiliates. You complain that CBS failed to meet its fairness doctrine obligations when it rejected NFLPA's request for time to respond to remarks of CBS commentator Tom Brookshier, broadcast on September 17, 1972 during the program "The NFL Today." You allege that those remarks occupied approximately two minutes of the program and were related to the "controversial issue of whether certain former professional football players should share in the pension rights which have accrued to certain other professional football players"; that during the broadcast in question, Mr. Brookshier expressed his opinion that former professional football players not currently included in the National Football League's retirement plan are entitled to inclusion in that plan because these former professional football players were responsible in part for making professional football successful; and that because the question of professional football pension rights was involved in Mr. Brookshier's remarks is a controversial issue of public importance, CBS is obligated to provide NFLPA an opportunity to respond to those remarks over CBS' facilities. You state:

> In its own context—the playing of professional sports—the issue presented herein is in fact a controversial one and could have a direct impact on both the players and the fans of professional football.

You assert further that continued monitoring of CBS programming shows that no view contrary to Mr. Brookshier's has been given treatment by CBS, and that CBS has no present or future plans to present NFLPA's position. In support of the assertion that the referenced dispute is a controversial issue of public importance, you state that on August 2, 1972, the National Football League Alumni Association (Alumni Association) filed a lawsuit against NFLPA and other named defendants in the Rhode Island U.S. District Court wherein

the following relief was sought: (1) inclusion of the Alumni Association's members in the retirement plan currently established for the sole benefit of the NFLPA's members to the exclusion of the Alumni Association's members and (2) the establishment of a separate trust to provide the funds necessary for any retirement benefits to which that court feels the Alumni Association may be legally entitled. Additionally, you refer the Commission to several items which appeared in various newspapers throughout the United States alluding to the dispute between the NFLPA and the Alumni Association.[1]

Following the CBS broadcast of Brookshier's remarks, you state that NFLPA requested CBS, once on September 18 and again on October 26, to grant NFLPA time to respond to those remarks. Your September 18 telegram to CBS stated in pertinent part that "the NFL Players Association hereby demands reply time to respond to the statements of Tom Brookshier (sic) on CBS' pre-game program . . . relating to former players and the 'responsibility of present day players.'" Although CBS rejected your request for response time asserting that there were no fairness doctrine obligations incumbent upon it to grant that request, it did provide you with a facsimile of Brookshier's transcribed remarks. On October 26, NFLPA again requested CBS "to provide a reasonable opportunity for the presentation of contrasting views on the subject of professional football players pension rights." In that correspondence you reiterated the position that CBS was obligated to grant your request for response time since, in your opinion, very serious fairness doctrine questions had been presented by CBS' refusal to grant NFLPA time to respond to Mr. Brookshier's remarks.

CBS replied to this inquiry by again denying your request for response time, asserting that Mr. Brookshier's comments did not deal with a controversial issue of public importance.

CBS justified this refusal on the basis of *Healey* v. *FCC*, ——— U.S. App. D.C. ———, 460 F. 2d 917 (1972), which held that even though an event or a dispute between private parties may warrant the attention of journalists and could thus be considered "newsworthy", such newsworthiness does not in and of itself constitute a controversial issue of public importance.

You also argue that your request for time to reply to Mr. Brookshier's remarks finds support in various decisions of the courts and this Commission; that the "public must not be left uninformed" (*Green* v. *FCC*, 447 F. 2d 323, 329 (D.C. Cir. 1971)); and that "under the First Amendment the public has the right to free and open debate" (*Green*, at 327). You state that "NFLPA readily concedes that the issue involved herein is not of the same magnitude as, for instance, the Vietnam War, school busing, or racial discrimination," contending, however, that "issues short of the above have been held to be worthy of fairness doctrine protection."

[1] You appended eight (8) such newspaper articles to the complaint. These articles, with the exception of one, refer to the lawsuit filed by the Alumni Association or the broader topic of the dispute over pension rights between the Alumni Association and the NFLPA. One article is an Associated Press news story which merely alludes to the fact that the lawsuit was filed and outlines the legal remedies sought by the Alumni Association. The newspapers from which this copy was extracted represent different regions of the United States. Four of the articles deal with the referenced dispute only in passing and incidental to other matters related to professional football discussed in the articles.

In ruling on your complaint, the primary question is whether the licensee was unreasonable or arbitrary in deciding that the remarks broadcast did not pertain to or raise a controversial issue of public importance. The fairness doctrine vests the licensee with the discretion to determine in the first instance whether a controversial issue of public importance has been broadcast.

As the Commission stated in *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 Fed. Reg. 10416 (1964):

> The fairness doctrine deals with the broader question of affording reasonable opportunity for the presentation of contrasting viewpoints on controversial issues of public importance. Generally speaking, it does not apply with the precision of the "equal opportunities" requirement. Rather, the licensee, in applying the fairness doctrine, is called upon to make reasonable judgments in good faith on the facts of each situation—as to whether a controversial issue of public importance is involved, as to what viewpoints have been or should be presented, as to the format and spokesmen to present the viewpoints, and all the other facets of such programming. See par. 9, Editorializing Report. In passing on any complaint in this area, the Commission's role is not to substitute its judgment for that of the licensee as to any of the above programming decisions, but rather to determine whether the licensee can be said to have acted reasonably and in good faith. There is thus room for considerably more discretion on the part of the licensee under the fairness doctrine than under the "equal opportunities" requirement.

In support of your fairness doctrine request that CBS provide time to respond to Mr. Brookshier's remarks, you cite *Green* v. *FCC*, *supra*, as authority for the proposition that both the First Amendment and the public interest standard found in the Communications Act of 1934 require CBS to grant your request so that the public not be left uninformed about the dispute between the NFLPA and the Alumni Association. However, *Green* additionally held that fairness doctrine complainants must show that the licensee's exercise of judgment under the fairness doctrine was "unreasonable, arbitrary, or in bad faith." (*Id.* at 324).

Healey v. *FCC*, *supra*, is cited by CBS as authority for its position that a controversial issue is not involved.[2] In *Healey*, the court focused on whether the licensee had acted unreasonably in deciding that the dispute between the two parties was not a controversial issue of public importance, and held that a dispute between private parties does not necessarily raise a controversial issue of public importance thus entitling complainant to invoke the fairness doctrine. The Court stated:

> Merely because a story is newsworthy does not mean that it contains a controversial issue of public importance. Our daily papers and television broadcasts alike are filled with news items which good journalistic judgment would classify as newsworthy, but which the same editors would not characterize as containing important controversial public issues. . . . Even if we considered the Putnam broadcast was primarily or substantially directed against petitioner Healey personally, there was still raised no controversial issue of public importance. *Id.* at 922.

[2] In *Healey*, the issue was whether the complainant's role as a Communist was a controversial issue of public importance requiring the licensee to provide complainant with time to respond to remarks made on the licensee's airwaves about complainant's activities as a member of the Communist Party. The licensee had permitted a commentator to comment on a newspaper story concerning complainant's role as a Communist in the United States. The comments made on the licensee's facilities were in derogation of the generally favorable newspaper article. The licensee subsequently refused complainant's request for time to respond to these comments.

The court further stated,

> To characterize every dispute of this character as calling for rejoinder under the fairness doctrine would so inhibit radio and television as to destroy a good part of their public usefulness. . . . It would in every way inhibit that "robust public debate" that the fairness doctrine was born to enhance. *Id.* at 923.

Finally, when ruling on questions of whether the facts of each case warrant the labeling of any particular matter a controversial issue of public importance, the Commission must determine whether in fact the questioned matter is one which calls upon the public, or the community, to make a decision or choice, and if so, whether the licensee has concluded unreasonably that the matter was not a controversial issue of public importance. See for example, *Retail Store Employees, Local 880* v. *FCC*, ——— U.S. App. D. C. ———, 436 F. 2d 248 (1970); *Editorializing Report*, 13 FCC 1246, par. 4.

CBS here determined that Mr. Brookshier's remarks of September 17 neither pertained to nor raised any controversial issue of public importance, although obviously Brookshier's comments explicitly referred to the substance of the lawsuit filed by the Alumni Association against the NFLPA. However, it does not appear that this dispute had assumed proportions of such controversy and public importance as to come within the fairness doctrine. Rather, the evidence submitted herein clearly shows that NFLPA and the Alumni Association are engaged in a dispute wholly private in nature and only incidentally related to or of interest to the public. NFLPA, in its first inquiry to CBS on September 18, implied that the issue was the "responsibility of present day players" to former players, later characterizing the pertinent issue as professional football player pension rights. The attachments submitted by the NFLPA in the form of newspaper copy show that there is interest in the matter by the nation's sportswriters and their readers, but not the kind of controversy which would raise the issue to one of public importance so as to warrant response time under the fairness doctrine. Even the NFLPA concedes that, at best, the issues involved are fairly well concentrated within the confines of the professional football sports world and fans of the game. Thus, we do not believe that CBS was unreasonable or arbitrary in determining that the referenced dispute was not such an issue falling within the fairness doctrine.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief*,
Complaints and Compliance Division
for Chief, Broadcast Bureau.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
STEPHEN J. PLATT, NEW YORK, N.Y.
Concerning Fairness Doctrine Re ABC Network

FEBRUARY 5, 1973.

MR. STEPHEN J. PLATT,
194 Riverside Drive,
New York, N.Y.

DEAR MR. PLATT: This will refer to your letters of complaint, dated September 20, October 7, and November 2, 1972, alleging that the ABC Television Network has violated the fairness doctrine in failing to cover the shooting sport events in its 1972 Olympic Games programming. In particular, you allege that ABC has "an established editorial policy which favors very stringent gun control bordering or not allowing individuals to own firearms regardless of reason," as evidenced by editorials broadcast by radio and television stations licensed to ABC (WABC Radio editorial No. 32, 1972 and WABC–TV editorial No. 21, 1971). You also state that in its Olympics programming, "ABC completely avoided news coverage, comment or any mention of any shooting sport event." Upon these allegations of fact, you contend that "when a licensee selects segments of an event (here, the Olympic Games) in conformity with its previously-established editorial policy (here, a policy supporting strict gun control) it is, in fact, presenting an editorial statement rather than an objective report" and that such selection "is no more than an extension of this policy." You conclude that "If the fairness doctrine is to be interpreted as the right of the public to be informed, then exclusion or censorship is certainly contrary to that doctrine."

In response to your inquiries, ABC states by letter dated October 10, 1972 that although the subject of gun control is "highly controversial" and stations licensed to ABC, Inc. have taken editorial stands on that subject, the ABC Television Network "has never taken a position on this matter." ABC also states that its stations "offer equal time to opponents of the position they purvey," and that in the network's "news and documentary programs, every effort is made to present balanced, impartial commentary on controversial issues." The network further states with respect to your complaint concerning its failure to cover the shooting sport events in its Olympics programming that:

> The selection of Olympic events was based on consideration of events which we felt were of interest to the broadest possible audience. Because of the scope of the Games, and the limitations imposed by time, selectivity was a necessity.

ABC also cites "programs like 'The American Sportsman'" as indicating that the network has "recognized the interest in shooting sports over the years."

In reply, you take exception with ABC's explanation that its selection of Olympic events was based on ascertainment of audience interest, stating:

> The shooting sport events had the second largest number of participants at the Olympics. Increasing interest was the introduction of a new event—boar shoot. Some of the shooting sport events provide more action per minute than any other event.

You also cite "the sales figures for shooting sport equipment" and "the estimates of the numbers of Americans who participate in shooting sports" as contradicting ABC's programming judgments in this matter. Finally, you state that "The American Sportsman" "is an old series showing sports personalities engaged in sporting activities such as fishing, sailing, mountain climbing and hunting," that this program "fails to provide any perspective towards the general category of shooting sports," and that "ABC, in its current programming, has no provision for coverage or mention of shooting sports."

You have requested the Commission to review this matter under the fairness doctrine and other applicable Commission rules and policies.

As explained to you in previous correspondence, where complaint is made to the Commission under the fairness doctrine, the Commission expects a complainant to submit specific information indicating, *inter alia*, reasonable grounds for the claim that the station or network involved has presented one side of a controversial issue of public importance and has not afforded, nor plans to afford, a reasonable opportunity for the presentation of contrasting views on that issue in its overall programming. As one court has recently observed:

> On a complaint under the fairness doctrine, the burden is not only on the complainant to define the issue, but also to allege and point specifically to an unfairness and imbalance in the programming of the licensee devoted to this particular issue. It is not enough for the complainant to allege there is a controversial issue of public importance on which the complainant wants to be heard. . . The essential element in invoking the fairness doctrine is that the licensee has not hitherto provided fair and balanced programming on this particular issue, and therefore, and only therefore, can the complainant assert a right for someone to be heard to rectify the existing imbalance. *Healey* v. *FCC*, 460 F. 2d 917, at 921 (D.C. Cir. 1972).

Although the subject of gun control may be a controversial issue of public importance, your complaint fails to make any allegation or statement of fact that either the ABC network or stations licensed to ABC have not afforded reasonable opportunity for the presentation and discussion of contrasting views on that issue in their overall programming. In this regard, the fact that ABC did not cover the shooting sport events in its Olympics programming and does not present regularly scheduled programs dealing with shooting sports does not, by itself, evidence failure to comply with fairness *vis a vis* the issue of gun control. Absent specific, detailed information indicating reasonable grounds for belief that either the network or stations licensed to ABC have not afforded reasonable opportunity for a discussion of contrasting views on that issue, no Commission action is warranted.

Should the Commission receive such information, it will consider the matter further.

Aside from fairness doctrine implications, the gravamen of your complaint is against ABC's selection of the events covered in its Olympics programming and its alleged failure to present sufficient programming on shooting sports. In this regard, Section 326 of the Communications Act specifically prohibits Commission censorship of broadcast material, and the Commission will not attempt to dictate the selection or presentation of particular programming by networks or station licensees. As the Commission has stated: "With respect to issues of program selection and control, the Commission . . . is not concerned with matters essentially of licensee taste or judgment." *Programming Policies*, 25 FCC 2d 342, at 343 (1970). Similarly, in distinguishing the fairness doctrine from matters wholly of licensee or network programming selection and judgment, the Commission has held:

> The fairness doctrine does not in any way prescribe the presentation of a news items or viewpoint nor does it specify any particular manner of presentation. . . . Aside from unusual situations . . ., it is not the proper concern of this Commission why a licensee presented a particular film segment or failed to present some other segment. Such choices are not reviewable by this agency. . . . Rather, we shall consider the overall question of whether reasonable opportunity for contrasting viewpoints was afforded with respect to this and other controversial issues referred to in the complaints we have received. *Letter to ABC et al*, 16 FCC 2d 650, 655–56 (1969).

Thus, neither the fairness doctrine, nor any other rule or policy of the Commission requires ABC or its stations to present specific programming dealing with shooting sports *per se*, and the Commission will not substitute its judgment for that of the network or stations in such programming matters.

You additionally allege that ABC excludes any significant coverage of shooting sports from its programming "in conformity with its previously-established editorial policy" favoring stringent gun control measures. However, in order for the Commission appropriately to commence action in this area, it must receive substantial extrinsic evidence of deliberate suppression of news or program material based upon the prejudices of the licensee or designed to advance its private interests, as, for example, statements by individuals having personal knowledge that the network or licensee ordered the suppression of particular news coverage or other programming for such purposes. As the Commission has stated with respect to the analogous area of news staging and distortion:

> . . . we believe that the critical factor making Commission inquiry or investigation appropriate is the existence or material indication, in the form of extrinsic evidence, that a licensee has staged news events. Otherwise the matter would again come down to a judgment as to what was presented, as against what should have been presented—a judgmental area for broadcast journalism which this Commission must eschew. For the Commission to investigate mere allegations, in the absence of a material indication of extrinsic evidence of staging or distortion, would clearly constitute a venture into a quagmire inappropriate for this government agency. *ABC et al, supra*, at 657–58.

It is noted in this regard that while ABC acknowledges that certain stations licensed to it have taken editorial stands on gun control, it states that the network itself has not done so. In any event, your complaint does not present any extrinsic evidence to support an allega-

tion of deliberate suppression of news or program material for the purpose of advancing the licensee's editorial position or serving its private interests.

As the Commission stated in *Citizens Communication Center*, 25 FCC 2d 705, 707:

> **Absent extrinsic evidence going to a policy inconsistent with the public interest (e.g., testimony of a station employee concerning his instructions from management), the Commission will not intervene in the programming process of a licensee, and specifically will not seek to establish the "true" motives by inference or credibility findings in this sensitive area. Commission interference would be inconsistent with the policies and spirit of the First Amendment and thus with the public interest.**

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division
for Chief, Broadcast Bureau.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
HORACE P. ROWLEY III, NEW YORK, N.Y.
Concerning Fairness Doctrine and Equal Opportunities Provision of Section 315 Re Television Stations WNET, WNBC–TV and WABC–TV

JANUARY 30, 1973.

HORACE P. ROWLEY III, Esq.,
416 East 81st Street,
Apartment 3–C,
New York, N.Y.

DEAR MR. ROWLEY: This is in reply to your letters concerning Television Stations WNET, WNBC–TV and WABC–TV, New York, New York in which you allege various violations of the fairness doctrine and the "equal opportunities" provision of Section 315 of the Communications Act of 1934, as amended.

In your June 21, 1972 letter concerning WNET you state that on May 8, 1972 President Nixon instituted a new war policy which consisted of bombing and mining North Vietnam; that the station on May 11 and 16 broadcast three programs totaling six ond one-half hours which were devoted to the presentation of the "extreme anti-war policy viewpoint" concerning the new war policy; that the programs featured well-known anti-war advocates, including Daniel Ellsberg and Jane Fonda; that WNET excluded other responsible viewpoints and denied the Administration a reasonable opportunity to express its viewpoint; that the controversial issue in this case was not the general issue of United States involvement in Vietnam but the specific issue of the wisdom of the "new U.S. policy of bombing and mining North Vietnam"; that on May 8, 1972 WNET broadcast a thirty-minute program featuring Senator Barry Goldwater, who expressed the Administration viewpoint on the U.S. bombing and mining policy in North Vietnam, and WNET broadcast various programs before May 8, 1972 in which spokesmen discussed the Administration's views on the Vietnam war; that the selection of spokesmen, format and the amount of time allotted to the Administration to present its viewpoints on the new bombing and mining policy was unreasonable and arbitrary; that the fairness doctrine requires a licensee to "discuss the spectrum of all responsible viewpoints"; that various presentations of Administration spokesmen and anti-war spokesmen represent extreme viewpoints and do not constitute a presentation of the possible spectrum of viewpoints held by the twelve million people in WNET's potential audience; that you asked WNET to present other contrasting viewpoints, but that it refused to do so; and that WNET

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has failed to fulfill its fairness doctrine obligations. You enclosed copies of correspondence between you and WNET.

In reply to a letter you wrote to WNET on June 3, 1972, the licensee sent you a response dated June 6, 1972 in which it stated that ". . . Our entire program schedule since the beginning of the year, has contained a fair balance of opposing views and spokesmen on issues associated with United States' involvement in Vietnam"; and that in its overall programming it had met its fairness doctrine obligations regarding the Vietnam conflict. The licensee listed a number of speakers who presented viewpoints contrasting to those of anti-war spokesmen in the following passage:

> By way of example, in January, our THIRTY MINUTES WITH . . . series featured Melvin Laird who expressed numerous views in support of the President's foreign policy. Also, in January, we presented a ninety minute special which included President Nixon's State of the Union address. Since February, the FIRING LINE, THIS WEEK and THIRTY MINUTES WITH . . . series have presented numerous spokesmen such as Ambassador Ellsworth Bunker (Firing Line 2/6/72), Richard Kleindienst (Thirty Minutes with . . . 2/19/72), Admiral Thomas Moorer (Thirty Minutes with . . . 3/9/72), South Vietnam's President Nguyen Van Thieu (This Week 3/29/72 and 4/5/72), Senator Robert Dole (Thirty Minutes with . . . 4/13/72), Congressman Robert Price (This Week 4/26/72), Patrick Buchanan (Thirty Minutes with . . . 5/4/72), President Nixon (This Week 5/10/72), Senator John Tower (Thirty Minutes with . . . 5/18/72) and several U.S. war veterans (This Week 5/31/72).
>
> In addition, in April, Channel 13 carried three consecutive hours in prime time of Secretary of State William Rogers' testimony before the Senate Foreign Relations Committee. Just recently, we telecast President Nixon's national address on the mining of North Vietnamese ports and this was followed by an interview with Senator Goldwater, commenting on the action. Further, our recently inaugurated 51st STATE series has included views and spokesmen who support continued U.S. involvement in Vietnam.

In response to WNET's reply you state in a June 8, 1972 letter to WNET that WNET has not presented "any organized argument in support of the new policy" and that the licensee completely excluded the moderate viewpoint which is in the center between President Nixon and Miss Fonda.

In a letter to you dated June 21, 1972, WNET states with reference to your allegations concerning the broadcasts on May 11 and 16:

> The two FREE TIME offerings in May were not exclusively devoted to mining of North Vietnamese harbors. They also discussed at length, Vietnam history, the administration's escalation policies, the effects of a prolonged war in Southeast Asia, the ability of the President to lead our country, the air war, student unrest, the P.O.W. issue, and a host of other issues associated with current U.S. foreign policy.
>
> In this connection, we believe that a discussion of the mining of Haiphong, and other North Vietnamese ports is part of the larger, more important issue of the Government's policy of military escalation (which dates as early as March 6 and which achieved prominence on April 10 with the announcement that the government was resuming B–52 raids—a tactic last employed in November, 1967). For your information, both the primary issue and the sub-issue were extensively discussed over our facilities.

WNET included a list of various programs it presented on the issue of increased military escalation of the Vietnam War, including the bombing and mining of North Vietnam.[1]

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[1] After May 8, 1972 WNET stated it broadcast the following programs which included a discussion of the bombing and mining of North Vietnam: (1) *NPACT Special* broadcast on May 8 featuring President Nixon's address to the Nation and an interview with

In a letter dated June 28 and supplemented by several other letters, including one dated October 31, 1972, you filed another complaint against WNET in which you allege violation of Sections 315(a), 399 and 312(a)(7) of the Communications Act of 1934, as amended, and Section 73.657(c)(2) of the Commission's Rules and Regulations. You state that New York State held its Democratic Presidential primary on June 20, 1972; that WNET on June 15, 1972 broadcast a thirty-minute program featuring Senator George McGovern; that during the program Senator McGovern debated a group of citizens who did not support his Presidential candidacy; that Senator McGovern's appearance was a "use" under Section 315; that WNET had an affirmative duty under Section 315(a) and Section 73.657(c)(2) to offer an equal opportunity to the other five legally qualified candidates for nomination; that none of the legally qualified candidates filed a request with the station for equal opportunities; that you do not represent any candidate; that "Under the First Amendment neither Congress nor the FCC has power to make a law that if a licensee offers or permits candidate A to use its broadcast facilities, then the licensee has discretion to either offer equal opportunities to rival candidates B and C, or to wait for them to request them"; that any political appearance which constitutes a use and which is broadcast five days before an election raises an affirmative obligation on the part of a licensee to offer time to all other legally qualified candidates; and that WNET's allowing Senator McGovern to use its broadcast facilities without charge and within five days of the election was an endorsement of Senator McGovern's candidacy.

The licensee's June 21, 1972 response to you states that:

> The "equal opportunities" provisions of the Communications Act provide that when a broadcaster permits the use of his facilities by a legally qualified candidate for public office, he is required to provide equal opportunity to all other such candidates for that office. However, the *broadcaster need not offer the time.* Rather, it is incumbent upon the candidate seeking the use of facilities to make a *timely request* therefor. For your information, we have not, to date, received such a request. However, if such a request is properly directed to the station, you may be assured that WNET will comply.

The licensee also states that Section 399 was not applicable to Senator McGovern's appearance and that WNET has not endorsed or editorialized on behalf of Senator McGovern's candidacy.

By letter dated August 3, 1972 you filed a complaint against WNBC–TV in which you allege that WNBC–TV has not covered and does not intend to cover the issue of "whether or not TV news programs are biased" and therefore has failed to meet its fairness doctrine obligations; that television news bias is a controversial issue of national importance (you cite various books, publications, articles and speeches

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Senator Barry Goldwater, (2) *This Week* broadcast on May 10 featuring filmed coverage of President Nixon's statement describing his action to prevent access to North Vietnamese ports and a report by a WNET staff member describing the technical objectives of new military strategy, (3) *51st STATE* broadcast on May 11 featuring "Man in the Street" interviews supporting the new military activities at Haiphong, and the views of Senator James Buckley and Senator Robert Dole supporting the President, (4) *51st STATE* broadcast on May 16 featuring interviews with several construction workers who supported the military escalation policy, and (5) *Thirty Minutes With* broadcast on May 18, featuring Senator John Tower supporting the mining of Haiphong. WNET also lists a variety of programs broadcast from March 29, to May 8, 1972 featuring speakers including President Thieu, Secretary of State William Rogers and Congressman Robert Price, who discussed the advantages of increased military escalation of the War, including the renewed bombing of North Vietnam.

to support your contention); that it is the station's responsibility under the fairness doctrine to initiate programming on television news bias; and that the Commission has the power to require such programming. You request "the Commission to order WNBC to forfeit an appropriate sum of money to the U.S., because WNBC has acted in 'bad faith.'" You include with your complaint copies of correspondence between you and WNBC–TV.

In a letter to you dated August 25, 1972, WNBC–TV states:

> WNBC–TV, in its news and public affairs programming, has presented to its public views concerning the accuracy and/or biasness of news programs. Within the past year, Edith Efron and James Keogh, both of whom are mentioned in your letter of August 3, appeared on the Today Show and discussed their opinions on this matter. WNBC–TV has also broadcast appearances of Dorothy Rabinowitz, a writer with *Commentary* and John Erlichman, Assistant to the President for Domestic Affairs, who discussed their similar positions. In addition, the views of Vice President Spiro Agnew on the accuracy of the media have received widespread dissemination in the news programs broadcast by WNBC–TV.

WNBC–TV also states that the fairness doctrine does not require time to be afforded to every view on an issue. In your August 31, 1972 response to WNBC–TV's August 25 letter, you again assert generally that WNBC–TV has failed to discuss television news bias and has failed to present the spectrum of all responsible viewpoints on the issue. You state (to WNBC–TV):

> You have apparently given Efron, Erlichman, Keogh and Rabinowitz time to state their viewpoints, but you have not given them time to state the grounds for believing that they are true. Also, you have not given time to other responsible viewpoints on the spectrum. *See*, L. Brown, *Television* (1971); R. Cirino, *Don't Blame the People* (1971); M. Mayer, *About Television* (1972); S. Mickelson, *The Electric Mirror* (1972). Next month Edward J. Epstein will publish a new book about this issue. Finally, you have not given time for the broadcasting industry viewpoint and the grounds for believing that it is true.

In a letter dated October 30, 1972 you allege that WABC–TV has not complied with its obligations under the fairness doctrine. You state that WABC–TV employs Geraldo Rivera, "a super-star reporter and commentator," and uses him "as an instrument to influence public opinion"; that Mr. Rivera in his off-camera activities has publicly endorsed and campaigned for Senator George McGovern for President; that from October 1 through October 23, Mr. Rivera reported and commented on WABC–TV's two daily newscasts; that there was a "general correlation" between the issues that Senator McGovern discussed and the issues that Rivera discussed; that WABC–TV ordered Mr. Rivera either to stop reporting until after the election; that Mr. Rivera at first decided to stop his political activities, then reversed his decision and stopped reporting until after the election; and that WABC–TV "must give 30 minutes of free time to the supporters of President Nixon because it has already given 30-minutes of free TV time to Rivera who is an "open and notorious supporter" of Senator McGovern. You further state that Section 315 does not apply to Mr. Rivera because he is not a candidate, but that under the fairness doctrine licensees must give "equal time" in situations where a television celebrity is associated as a supporter of a specific candidate and has appeared almost daily on newscasts where that candidate's election was discussed. You state:

> [C]learly, the rule is that if a licensee has given free TV time to a reporter and commentator (1) who is a celebrity, (2) who is an open and notorious supporter of 1 candidate, and (3) has frequently appeared on newscasts where the election was discussed, then the licensee must give equal time to rival candidate's supporters.
>
> The rule has a very narrow application. If a reporter is not a celebrity, then the rule does not apply. If the reporter is a celebrity and *privately* supports a candidate, then the rule does not apply. If the reporter is a celebrity, publicly supports a candidate and does not frequently appear on newscasts where the election is discussed, then the rule does not apply.

You enclosed copies of correspondence between you and WABC–TV. In reply to your complaint, ABC in a letter to you dated October 25, 1972, states that:

> For your information, the "equal opportunities" requirement of Section 315 of the Communications Act of 1934, as amended, pertains exclusively to appearances by "legally qualified candidates" for public office. Inasmuch as Mr. Rivera is not a candidate for public office, Section 315 is clearly inapplicable to his appearances. . . .
>
> In addition, your letter does not refer to a single instance where Mr. Rivera's appearance on the WABC–TV EYEWITNESS NEWS program has involved direct or indirect support for Senator McGovern's candidacy. We do not believe that there has been a single news report broadcast by WABC–TV in which Mr. Rivera has expressed a partisan viewpoint or has engaged in advocacy on behalf of Senator McGovern. We believe that Mr. Rivera has at all times conducted himself as an objective and responsible journalist whose personal viewpoints, political or otherwise, are not reflected in his coverage of the news on WABC–TV.

Certain basic principles in the application of the fairness doctrine apply to all of the above situations. We will discuss these principles first, and then take up the individual complaints. The fairness doctrine requires a station which presents one side of a controversial issue of public importance to afford reasonable opportunity for the presentation of contrasting views by responsible spokesmen. These views need not be presented on the same program; the opportunity may be afforded in the station's overall programming, including news programs, interviews, discussions, debates, speeches and the like. The purpose of the doctrine is to promote the fullest possible debate on public issues, to the end that the public will be informed. See *Editorializing by Broadcast Licensees*, 13 FCC 1246 (1949). The fairness doctrine does not require precise equality in opportunity such as is required for candidates for public office, but rather that reasonable opportunity be afforded. Nor does it require a separate opportunity for every shade of viewpoint. Moreover, the licensee has considerable discretion in the manner and timing of achieving fairness. The licensee, in applying the fairness doctrine, is called upon to make reasonable judgments in good faith on the facts of each situation, to determine whether a controversial issues of public importance is involved, what viewpoints have been and should be presented, the format and spokesmen to present the viewpoints, and all other facets of such programming. The Commission will not substitute its judgment for that of the licensee, who is responsible for station operation; the Commission limits its role to determining whether the licensee has acted reasonably and in good faith. See *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 FCC 598 (1964).

In your fairness doctrine complaint against WNET you state that the controversial issue in the case is not the general issue of United

States involvement in Vietnam but the specific issue of the wisdom of the "new U.S. policy of bombing and mining North Vietnam" announced by President Nixon on May 8, 1972. In applying the fairness doctrine, it is sometimes difficult to determine whether only one general issue exists or whether another distinct but related issue arising out of the general issue should be treated separately. Surely, the bombing and mining of North Vietnam became controversial issues of public importance, although they are subordinate to the general Indochina war issue. For purposes of this discussion, we can assume that the controversy over the bombing and mining is sufficiently separable from the general controversy over the Vietnam war to be treated as a distinct issue under the fairness doctrine. However, we do not feel it was unreasonable for WNET to conclude that the bombing and mining policy announced by President Nixon on May 8 was part of the larger issue of military escalation of the war which dated back to March and April of 1972. WNET notes that on April 10 the government announced renewed B–52 bombing raids in North Vietnam. Therefore, while the bombing and mining of North Vietnam could perhaps be treated as a separate controversial issue we do not agree with your conclusion that this issue need necessarily be isolated from other events in the way you urge. We believe that WNET was not unreasonable in considering as relevant programs it broadcast in March and April 1972 concerning the military escalation of the war, and specifically the renewed bombing of North Vietnam, in determining whether it fulfilled its fairness doctrine obligation on this issue.

You state that WNET failed to fulfill its fairness doctrine obligations concerning the new bombing and mining policy in that it presented only the "extreme" viewpoints on that issue (i.e., the anti-war viewpoint and the Administration viewpoint), and that it failed to present the "moderate viewpoint which is in the center between President Nixon and Miss Fonda." You argue that the fairness doctrine requires presentation of the spectrum of all responsible viewpoints held by the twelve million people in WNET's potential audience. As stated above, the fairness doctrine does not require a licensee to provide an opportunity for the presentation of every viewpoint on an issue. Rather, a licensee is called upon to make reasonable judgments as to the viewpoints to be presented and the spokesmen to present the viewpoints. WNET determined that the broadcast by the anti-war speakers you listed and the various Administration spokesmen cited in its June 6 and 21 letters fulfilled its obligation to present opposing viewpoints. Your assertion that WNET failed to present the "moderate viewpoint which is in the center between President Nixon and Miss Fonda" fails to state how WNET was unreasonable in its selection of viewpoints. WNET's decision that the spokesmen it presented on the issue of the bombing and mining of North Vietnam presented significant contrasting viewpoints does not appear to be unreasonable on the basis of the information before the Commission. Thus, your complaint that WNET failed to fulfill its fairness doctrine obligations on the grounds that it did not present "all responsible viewpoints" must be denied.

You also assert that WNET's selection of spokesmen and format to present the Administration's viewpoint on the bombing and mining

of North Vietnam was unreasonable and arbitrary. WNET presented various Administration spokesmen commenting on the bombing and mining policy, including President Nixon (May 8 and 10, 1972), Senator Barry Goldwater (May 8, 1972), Senator Buckley (May 11, 1972), Senator Robert Dole (May 11, 1972) and Senator John Tower (May 18, 1972). WNET also broadcast "Man in the Street" interviews featuring supporters of the Administration on May 11, 1972 and interviews on May 16 with construction workers who also supported the President's military escalation.

WNET used various formats to present the viewpoints, including (i) the President's address to the nation in live, uninterrupted, prime-time programming in which Mr. Nixon presented his views in the mode and format he chose; (ii) studio interviews; (iii) speeches and (iv) man-in-the-street interviews. You have not furnished the Commission with any significant information that substantiates your claim that the licensee's selection of the above named spokesmen to present opposing views and the format in which they appeared was unreasonable and arbitrary.

You also contend that WNET has failed to afford opposing spokesmen with a reasonable opportunity to present their views on the basis of disproportionate amounts of time allotted to each side. In your June 28 letter, you state that only thirty minutes were given to Administration spokesmen whereas anti-war spokesmen were allotted six and one-half hours between May 8 and June 28, 1972. However, you fail to include in your computation President Nixon's May 8 and 10 appearances, Senator Buckley's and Senator Dole's May 11 statements and Senator John Towers' statement on May 18 in support of the Administration's new bombing and mining policy. You also fail to consider that the issue of bombing and mining North Vietnam was dealt with on programs broadcast before May 8, 1972; and whether the President's policy of bombing and mining North Vietnam was mentioned in any other WNET programs.[2] The Commission expects an individual who lodges a fairness doctrine complaint to set forth reasonable grounds for concluding that the station failed to afford reasonable opportunity for presentation of contrasting views in its overall programming, and does not plan to present opposing views. *Allen C. Phelps*, 21 F.C.C. 2d 12, 13 (1969). As indicated above, you have not presented such information to the Commission.

In your second complaint against WNET, you allege that Senator George McGovern's thirty minute appearance on a WNET June 15, 1972 program was a "use" by a candidate and that failure of WNET to offer equal opportunities to the other legally qualified Democratic candidates running for President in the New York primary was a violation of Section 315(a) of the Act and 73.657(c)(2) of our rules. Section 315 of the Communications Act of 1934, as amended, states that if a licensee permits any person who is a legally qualified candidate for public office to use a broadcasting station, he must afford "equal opportunities" to all other such candidates for that office in

[2] We also note that WNET states that the six and one-half hours broadcast on May 11 and 16, to which you refer, were not exclusively devoted to a discussion of the bombing and mining policy but also included discussions of the P.O.W. issue, Vietnam history, student unrest and the ability of President Nixon to lead our Country.

the use of such broadcasting station. If a legally qualified candidate appears on a bona fide newscast, bona fide news interview, bona fide documentary or on-the-spot coverage of a bona fide news event, such an appearance will not be deemed a use of a broadcasting station for the purposes of Section 315. The Commission's rule with respect to television political broadcasts coming within Section 315 of the Communications Act is Section 73.657.

In the Communications Act of 1934, as amended, Congress specifically authorized the Commission to adopt rules to effectuate the provisions of Section 315. Thus, Section 315(a) provides that "The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this Section."

The Commission promulgated the following regulation with respect to all equal time requests:

> (e) Time of request. A request for equal opportunities must be submitted to the licensee within 1 week of the day on which the first prior use, giving rise to the right of equal opportunities occurred: Provided, however, That where the person was not a candidate at the time of such first prior use, he shall submit his request within 1 week of the first subsequent use after he has become a legally qualified candidate for the office in question. (See Section 73.657(c) of the Commission's Rules and Regulations.)

Thus, a licensee, except in rare instances [3], has no affirmative obligation to contact a candidate and offer him equal opportunities. The Commission has consistently held that the request for equal time must be initiated by the candidate or his representative and must occur within seven days of the first prior use. See 35 Fed. Reg. 13045, 13066–67 Section IX (1970). In this case, both you and licensee agree that no legally qualified candidate or his representative requested equal time; that you do not represent any candidate; and that WNET would offer its facilities to any legally qualified Democratic Presidential candidate who made a timely request for "equal opportunities." Thus, WNET did not violate Section 315 or Section 73.657. Further, you have not presented any evidence that WNET during its broadcast of the Senator McGovern interview editorialized or endorsed Senator McGovern's candidacy, in violation of Section 399 of the Communications Act.

Your allegation that WNET violated Section 312(a)(7) by willfully or repeatedly failing "to allow reasonable access to or permit purchase of, a reasonable amount of time for the use of a broadcasting station by a legally qualified candidate . . ." is unsupported. WNET's broadcast of a free 30 minute interview with Senator McGovern does not in and of itself violate Section 312(a)(7) as you appear to believe.

With respect to WNBC–TV you allege that the station has not covered the issue of "whether or not TV news programs are biased." However, WNBC–TV listed in its August 25, 1972 response to you a variety of appearances by spokesmen who have discussed the news

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[3] You cite *Dolph-Petty Broadcasting Co.*, 30 F.C.C. 2d 675 (1971), to support your contention that since Senator McGovern appeared five days before the New York primary election, WNET should have notified Senator McGovern's opponents. However, we do not believe the situation here can be equated with that in *Dolph-Petty*. There the licensee gave free time to one opponent only two days before the election. Here Senator McGovern appeared five days before the election, which we believe afforded ample time within which his opponents could have requested equal opportunities.

bias issue. In both your August 3 and August 31, 1972 complaints against WNBC–TV you failed to provide specific information setting forth reasonable grounds for your conclusion that the licensee in its overall programming has not presented or does not intend to present opposing views on the issue of television news bias. We note that, contrary to your assertions, WNBC–TV appears to have covered this issue. Thus no action regarding WNBC–TV is warranted.

In your complaint against WABC–TV you state that under the fairness doctrine licensees must provide equal opportunities to all legally qualified candidates where a television celebrity is "an open and notorious supporter" of one candidate and has appeared frequently on newscasts in which the election was discussed. We note that since you do not allege that a candidate personally appeared, the equal opportunities provision of Section 315 is not applicable. The fairness doctrine does not require the result you reach and has never been so administered. It relates to the discussion of issues. Thus, in our 1970 ruling, *Letter to Nicholas Zapple*, 23 F.C.C. 2d 707, the Commission held that when a licensee gives or sells time to supporters of or spokesmen for a candidate during an election campaign who either urge the candidate's election, discuss the campaign issues, or criticize an opponent, the licensee must give or sell comparable time, as the case may be, to the spokesmen for an opponent. *Zapple* held that the licensee is not obligated to provide free time to respond to supporters of a candidate if the supporters of the opposing candidate purchased time. The *Zapple* ruling of course dealt with the discussion of campaign issues. We do not believe that the requirements of fariness support your proposed new policy of requiring equal time whenever a "celebrity" who has publicly supported a candidate frequently appears on newscasts.

We note in this connection that you do not allege that Mr. Rivera introduced himself as a McGovern supporter or advocated the election of McGovern during his broadcasts. The mere on-camera appearance of a celebrity, who has become associated with a candidate in his off camera activities does not of itself raise fairness obligations. Thus, your claim that Mr. Rivera's appearances raised quasi-equal time obligations must be denied.

For the reasons set forth above, no further action is warranted on your complaints.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division
for Chief, Broadcast Bureau.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
ARTHUR K. SNYDER, COUNCILMAN, CITY OF LOS ANGELES
Concerning Fairness Doctrine Re Station KNX

JANUARY 30, 1973.

Mr. ARTHUR K. SNYDER,
Councilman, City Council of the City of Los Angeles, City Hall, Los Angeles, Calif.

DEAR MR. SNYDER: This will refer to your letter of complaint, dated October 27, 1972, and received in this office on November 3, 1972 alleging that Radio Station KNX, Los Angeles, California, has failed to comply with the rules and policies of the Commission applicable to the broadcast of political editorials.

You have submitted transcripts of two editorials which were broadcast by Station KNX on October 14 and 22, 1972. The October 14 editorial presented the following remarks:

> Last Tuesday eight Los Angeles Councilmen moved a step closer to selling out to the oil hustlers. Those eight voted to let Occidental Oil start drilling in the Pacific Palisades.
>
> KNX has opposed this for years and we want to re-cap our reasons for our opposition to Pacific Palisades drilling. One, the majority of residents in the area are against such drilling. In a democracy, that should be enough. Two, the area is geologically unsafe. This is where houses slip off the cliffs. Where landslides close the highway and have killed at least one person already. This is emphasized by a $300,000 city study made in 1957. That underscored the long history of earth instability. Further, a City Geological Hazards Committee of distinguished scientists said the Pacific Palisades are, ". . . a potential geological hazard that, in our opinion, present an imminent and immediately impending threat to life and property." Both are city studies and both are being ignored by councilmen who put private profit over public safety. These councilmen are: Don Lorenzen, Louis Nowell, John Ferraro, Billy Mills, Gilbert Lindsay, Robert Wilkinson, John Gibson, and Art Snyder.
>
> But, this isn't the end of it. KNX opposes this project because we believe a secret and illegal deal was made between City Hall and Occidental Petroleum.

The October 22 editorial stated the following:

> Well, the City Fathers sold out to the oil hustler friends of Sam Yorty.
>
> City Councilmen voted to let Occidental Oil drill in geologically unsafe Pacific Palisades. Ignoring the city's geology reports and overwhelming public opposition these councilmen gave Occidental its way.
>
> The surprise vote that made this possible came the week before on the first reading of the ordinance from Arthur Snyder. Here's a man planning to run for mayor or supervisor who seeks public support and plays the environmentalist. His vote to sacrifice the Palisades on the altar of Occidental's profit was unexpected. That is, it was unexpected unless you know who supports him financially.

Listed on his 1971 Dinner Campaign Committee are Mrs. Bonnie Riedel and Mr. and Mrs. Harold Morton. Mrs. Riedel was a planning commissioner when the Occidental deal was getting started. Last week she showed up at City Council as a paid spokeswoman for—guess who? Occidental Oil.

The Mortons have had long-time connections in the oil industry. Mrs. Morton has been a Recreation and Park Commissioner for years and that's the other department involved in this outrageous flim-flam.

Others who serve on Art's campaign committees include Planning Commissioners Stan Diller and David Moir; and Recreation and Park Commissioner James Madrid. In addition, one of Art's biggest contributors is oil man Henry Salvatore.

So, we can see who Art Snyder's friends are. As KNX views it, they are clearly not the people of Los Angeles.

You have also submitted copies of letters from the Editorial Director of Station KNX which you received within a week of the broadcast of each editorial and which included a transcript of the respective editorial and an offer of time for you to tape and present a reply over the station's facilities.

In particular, your complaint states four objections to the editorials in question. First, the station did not contact you in advance of the broadcast of the editorials to ascertain "the truth or falsity" of the factual statements contained therein. Second, the editorials were broadcast before you were informed of their content and offered an opportunity for response thereby making it impossible for you to prepare and present an effective and "timely" reply. Third, "the editorials were extremely inaccurate, and state as fact matters which are not true." And fourth, the editorials were "clearly and purposely slanted so as to cast doubt upon my honesty and integrity, when there is absolutely no reason for any suspicion of misdoing on my part."

You have asked the Commission to review this matter and to take whatever action appears appropriate.

Under Section 73.123(a) of the Commission's Rules and Regulations, if, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the station licensee must, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities. Assuming *arguendo* that the editorials in question contained personal attacks upon you within the meaning of this rule, it would appear from the copies of correspondence which you have submitted that the station has complied with the obligations attending such broadcasts. In particular, you were notified of the editorials within one week of their broadcast and given transcript of their content, and you were offered an opportunity to tape and present a reply over the station. Upon these facts, no violation of Commission rule or policy is evident. It should be noted in this regard that except for editorials endorsing or opposing candidates for public office which are broadcast within 72 hours prior to the day of election, there is no requirement that subjects of editorials be notified in advance of broadcast.

With respect to your allegations that the editorials in question contained statements which were "extremely inaccurate" and evidenced

the station's deliberate disregard as to their "truth or falsity", it is the position of the Commission that it would be inappropriate for this agency to review and determine the "truth" of every factual situation, to evaluate the degree to which the matter complained of departed from that "truth", and, finally, to call upon the licensee to explain any discrepancy. Rather than determining the truth or falsity of broadcast statements, the Commission, in formulating and enforcing the fairness doctrine, deems it more appropriate to assure that whenever one side of a controversial issue of public importance is presented the licensee will afford a reasonable opportunity for the presentation of contrasting views. Neither the fairness doctrine nor any other rule or policy of the Commission proscribes the broadcast of a one-sided editorial. Moreover, the Commission has always encouraged robust wide-open debate and this may include editorials which appear to be unfair or distorted. What is required is that the other side be afforded opportunity to present its viewpoint. See *Letter to Mrs. J. R. Paul*, 26 F.C.C. 2d 591 (1969), a copy of which is enclosed. In offering you opportunities to reply to the editorials in question, it would appear that the station has sought to comply with its fairness obligations.

In view of the foregoing no further Commission action is warranted.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division
for Chief, Broadcast Bureau.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
UTILITY CONSUMERS COUNCIL OF MISSOURI, ST. LOUIS, MO.
Concerning Fairness Doctrine Re Stations
KSD and KTVI

FEBRUARY 5, 1973.

ALBERTA SLAVIN,
President, Utility Consumers Council of Missouri, 631 East Polo Drive, St. Louis, Mo.

DEAR MRS. SLAVIN: This refers to your letter of August 25, 1972 concerning your fairness doctrine complaints against Television Stations KSD and KTVI, St. Louis, Missouri. Because the staff was for many months swamped with complaints and inquiries related to the 1972 primaries, conventions and general elections, which would have become moot unless they were resolved at once, it was necessary to postpone consideration of many other complaints, and we are only now able to respond to some which we normally would have dealt with much earlier.

You contend that the above stations are selling air time to Union Electric Company of Missouri for editorial advertising regarding its request for a rate increase pending before the Public Service Commission of Missouri and that the stations are failing to make reasonably appropriate means available to your organization "to correct the misleading assertions of such advertising." You state that "the Union Electric advertising is propagandistic in that it is a one-sided 'hard sell' for higher rates"; that "such advertising cannot be effectively countered by the interview of a person opposed, since the role of the interviewer (and properly so) is to seek public enlightenment through the cross-examination technique"; that your organization considers "such direct attempts to favorably mold public opinion on a matter of direct and immediately public concern a more pressing situation for the application of the 'Fairness Doctrine' than the more subtle attempts through product advertising"; and that there is also the problem of the repetitive nature of the advertisements. You further state that your organization has prepared a 60-second animated tape giving the opposing view of this public issue and has requested all stations that have aired and continue to air the Union Electric Company advertisements in question to grant air time in appropriate frequency for the running of the counter message. You state that Television Station KPLR, St. Louis, Missouri, has granted your request while KSD–TV and KTVI–TV have refused to do so. You

further state that two of the Union Electric commercials aired on KPLR–TV are as follows:

(1) The St. Louis area . . . a revitalized community in brick, steel and spirit . . . growing, dynamic, attracting new industries and new people . . . all creating greater demands for electricity . . . so great, that the demand on the Union Electric system will double in the next ten years. To keep pace, Union Electric must spend one billion dollars in the next five years alone to expand its facilities. We must raise huge amounts of capital from people in all walks of life to build those facilities, and before they will invest their money with us, they must be assured of a fair return. Our electric rates must cover the cost of keeping our air and water clean, higher fuel costs, higher wages, and taxes, and the rates must provide sufficient return to attract new money, so Union Electric needs higher rates to meet the electric power demands of this dynamic area.

(2) St. Louis—from fur trading posts, bustling river town—to modern metropolis . . . and still growing . . . with electric energy providing an ever-improving standard of living for all people. As this dynamic and diversified area continues to grow, its needs for electricity will double by 1980. Union Electric must spend one billion dollars to keep pace with that growth—one billion dollars in the next five years alone for additional facilities to supply more and more clean, efficient electric energy. One billion dollars is a lot of money. In order to raise money at the lowest possible cost, Union Electric must be a financially sound company. That's why the company is seeking an increase in its rates. Union Electric—planning ahead and working ahead to provide this area with the abundance of electric power it will need for future growth and prosperity.

You request that the Commission rule that KSD–TV and KTVI–TV must air your organization's 60-second tape at such times and with such frequency as will satisfy the requirements of the fairness doctrine.

Your letter of August 25th enclosed a copy of a letter to you, dated May 10, 1972, from Mr. Harold Grams, Vice-President, Broadcasting, The Pulitzer Publishing Company, licensee of Station KSD–TV, which stated "In addition to news coverage of the opposition to Union Electric's request for a rate increase, we are also making time available for discussion of the issue by interested organizations who are opposing the rate increase. We have scheduled an appearance on KSD–TV by a representative of ACTION. Your organization has also been offered an opportunity to appear on KSD–TV and express opposition to the Union Electric rate increase. Keith Gunther, who is receiving a copy of this letter, is prepared to schedule an interview by a representative of your organization as soon as he is contacted by letter or phone." Also enclosed with your letter of August 25th was a copy of a letter to you, dated April 20, 1972, from Mr. Vic Skaggs, Program Manager, KTVI–TV, which stated "we would be pleased to offer one of our public service programs such as 'Perception' for the purpose of expressing your views concerning the rate increase requested by Union Electric."

The fairness doctrine provides that if a station presents one side of a controversial issue of public importance, it is required to afford reasonable opportunity for the presentation of contrasting views. The fairness doctrine does not require that "equal time" be afforded for each side, as would be the case if a political candidate appeared on the air during his campaign. Instead, the broadcast licensee has an affirmative duty to encourage and implement the broadcast of contrasting views in its overall programming which, of course, includes statements or actions reported on news programs. Thus, both sides need not be given in a single broadcast or series of broadcasts, and no particular

person or group is entitled to appear on the station, since it is the right of the public to be informed, which the fairness doctrine is designed to assure, rather than the right of any individual to broadcast his views. It is the responsibility of the broadcast licensee to determine whether a controversial issue of public importance has been presented and, if so, how best to present contrasting views on the issue. The Commission will review complaints to determine whether the licensee can be said to have acted reasonably and in good faith.

In regard to editorial advertising, the Commission in its *Letter to Business Executives' Move for Vietnam Peace*, 25 F.C.C. 2d 242 (1970), ruled that stations were not obligated to sell time to the group, Business Executives' Move for Vietnam Peace (BEM), to present paid commercial announcements against the United States' policy in Vietnam. That decision was appealed and the Court of Appeals reversed the Commission's ruling in *Business Executives' Move for Vietnam Peace* v. *F.C.C.*, —— U.S. App. D.C. ——, 450 F. 2d 642 (1971). The Commission appealed to the Supreme Court and on February 28, 1972, the Supreme Court granted certiorari and also stayed the mandate of the Court of Appeals. Thus, the Court of Appeals' decision voiding a flat ban of paid public issue announcements is in abeyance at the present time pending a Supreme Court decision.

For your further information, the general subject of counter-advertising is now under consideration by the Commission in its comprehensive review of the fairness doctrine.

In view of the fact that both KSD–TV and KTVI–TV have offered your organization broadcast time to present contrasting views to those presented in the Union Electric Company of Missouri advertisements, and the absence of any showing of such disparity in the presentation of contrasting views on the continuing issue which would warrant further inquiry, it does not appear that Commission action is warranted at the present time.

Enclosed for your further information is a copy of the Commission's Public Notice of July 1, 1964, entitled "Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance." If you have specific information that any licensee in its overall programming has failed to comply with the fairness doctrine, let us know and we will give this matter further consideration. (See page 10416 of the enclosed Public Notice regarding the filing of fairness doctrine complaints.)

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaints. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division
for Chief, Broadcast Bureau.

F.C.C. 73–158

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.202(b), TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS. (HAMPTON, PELLA, CEDAR RAPIDS, AND CHARLES CITY, IOWA; KEYSER, W. VA.; CRYSTAL RIVER AND GAINESVILLE, FLA.).	Docket No. 19401, RM–1750, RM–1756, RM–1757, RM–1777, RM–1790, RM–1829

SECOND REPORT AND ORDER

(Adopted February 7, 1973; Released February 12, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT; COMMISSIONER H. REX LEE ABSENT.

1. The Commission has under further consideration the Notice of Proposed Rule Making (37 Fed. Reg. 1067), and the Further Notice of Proposed Rule Making (37 Fed. Reg. 3548), concerning the amendment of Section 73.202(b) of the Commission's Rules, the Table of FM Assignments. The Report and Order (35 F.C.C. 2d 535 (1972)) gave consideration only to the proposal for substitution of a channel at Keyser, West Virginia (RM–1756).

2. This Second Report and Order deals with the remaining five proposals for assignment of FM channels in the states of Florida and Iowa, plus a conflicting proposal submitted as a result of the Notice. Briefly, the proposals to assign or to exchange channels at the following communities are adopted: Charles City, Hampton and Pella, Iowa; Crystal City and Gainesville, Florida. The detailed consideration of the proposals are set forth below.

3. *Hampton, Pella, Cedar Rapids and Charles City, Iowa (RM–1750 and RM–1829).* The rule making here was instituted as a result of the petitions filed by Obed S. Borgen (RM–1750) and Dwaine F. Meyer (RM–1829). Because of short spacings Borgen's request for assignment of Channel 276A to Hampton, Iowa, required either a substitution of Channel 276A for Channel 275 at Cedar Rapids, Iowa, or a limitation to the use of Channel 275 to a site eight to ten miles south or east of the community. However, substitution of Channel 276A at Cedar Rapids conflicted with the proposal for assignment of Channel 277 at Pella, Iowa, filed by Meyer, because of short spacing. The Notice gave consideration to the various solutions of conflicting requests and invited comments to explore the possibility of making the assignments as follows:

City	Channel No.	
	Present	Proposed
Charles City, Iowa	285A	240A
Hampton, Iowa		285A
Pella, Iowa		277 or 292A

Comments in support of the proposals were submitted by the two petitioners, and comments in opposition were filed by Radio, Incorporated, licensee of Station KCHA–FM, Charles City, Iowa.

4. To circumvent the necessity of changing the assignment or placing a restriction on the use of the channel at Cedar Rapids, the proposed assignment above would require a substitution of Channel 240A for Channel 285A at Charles City, Iowa, which is licensed to Station KCHA–FM, and Channel 285A would be assigned to Hampton, Iowa. This would also allow for assignment of Channel 277 to Pella, Iowa. As to Pella, there was a question, due to insufficient population data, whether a Class C channel should be assigned to a community the size of Pella; hence alternative channel assignments were proposed. Mr. Meyer's new showing in response to the Notice of Proposed Rule Making indicates that a Class C station at Pella would provide a first FM service to 76 square miles with 1,276 population, whereas a Class A station would not provide such service, and a second FM service to 483 square miles with a population of 22,936, while a Class A station would provide a second service to 57 square miles with 1,114 population.

5. Radio Incorporated, licensee of Station KCHA–FM, contends that the proposed change in the channel assignment at Charles City is confiscatory by reason of great expense required to make the change of channels and objects to the proposed amendment of Section 73.202 (b) of the Rules. The grounds for the objection are that it has expended time and money promoting the frequency; expenditure of more money for advertising and promoting the new frequency; and that there would be loss of listenership and revenue and would require the expenditure of more money for advertising and promoting the new frequency; and that Channel 240A might be expected to present a second harmonic interference problem on Channel 9 television and within the listenership of KCHA–FM. Radio Incorporated states that should the Commission rule that the proposed amendment is in the public convenience, interest or necessity, the burden of expense upon KCHA–FM would be confiscatory, and lists 11 items of expenses which it believes would be necessitated by the change of frequency: legal, filing and consulting engineering fees; costs of labor, new antenna system, new transmitter or changes in existing transmitter, new monitoring equipment or changes in present monitoring equipment, replacement of office materials, postage, telephone expense; loss of revenue during silent time and damages for loss of listenership on established frequency. In addition, it asserts that inconvenience and the nuisance to the licensee would be considerable and creates a damage for which the licensee should be compensated, and contends that the total cost to KCHA–FM, in the event the change is ordered, would exceed $12,500.

109–027—73——6

6. We have carefully considered the proposals and the opposition filed thereto and conclude that it would be in the public interest to assign Channel 285A to Hampton, Iowa, and Channel 277 to Pella, Iowa. Channel 285A at Charles City, Iowa, would be changed to Channel 240A. The assignment to Hampton would provide for a first local broadcast facility to the community and Franklin County in which it is located. A Class C station at Pella would also provide for a first local broadcast facility with a coverage providing for a first and second FM service to substantial portions of the outlying area. The two petitioners have stated that they are willing to reimburse Station KCHA–FM the pro rata share of the reasonable cost that would be incurred in the change of assignment, and that they will make applications for the use of the channels and construct the stations, if authorized.

7. One of the objections raised by Radio Incorporated is the possibility of second harmonic interference to the television reception in the Charles City area. The TV Factbook indicates that Floyd County, wherein Charles City is located, is in the reception area of Station KCRG–TV, Channel 9, Cedar Rapids, Iowa. Since the second harmonic of Channel 240A (191.8 mHz) falls slightly above the aural carrier of Station KCRG–TV, the second harmonic interference to the television reception could occur. However, this matter has been presented in a number of cases in the past, and the Commission has indicated its view that it is a matter which can be corrected, and is not a consideration warranting a limitation on making FM assignments. See Information Bulletin FCC 65–130 (February 19, 1965) and Public Notices "Policy to Govern the Change of FM Channels to Avoid Interference to Television Reception" and "FM Interference to TV Reception", FCC 66–106 (2 F.C.C. 2d 462) and FCC 67–1012, February 2, 1966 and September 1, 1967, respectively. Where we have changed FM assignments on this basis, it has usually been in areas where FM channels are plentiful, which is not the case here. In this regard, Radio Incorporated has suggested that Channel 240A could be assigned to Hampton instead. However it overlooks the assignment of Channel 240A at Webster City, Iowa, some 38 miles from Hampton; the required separation is 65 miles.

8. Since the action taken here will require a change in the operating frequency of Station KCHA–FM, the station should be reimbursed by the benefiting parties (the permittees for Hampton Channel 285A and for Pella Channel 277) for the reasonable costs of the channel change. Mr. Borgen asserts that the cost of modification is estimated to be approximately $1,090. However, Radio Incorporated believes that it should be compensated in the excess of $12,500, but it did not substantiate the estimate. We leave the matter of determining the appropriate costs to the interested parties, subject to Commission approval in case of dispute. We have on previous occasions delineated the guidelines setting forth the items which may be the subject of reimbursement. See *Second Report and Order, Docket No. 16662 (Circleville, Ohio)*, 8 F.C.C. 2d 159 (1967). We expect that parties eventually involved will attempt in good faith to reach agreement on what constitutes a reasonable settlement.

9. Since the change is in the public interest, the licensee of Station KCHA–FM shall file its February 1, 1974, renewal application specifying operation on Channel 240A rather than 285A. *Transcontinent Television Corp.* v. *FCC*, 113 U.S. App. D.C. 384, 308 F. 2d 339, 23 Pike & Fischer, R.R. 2064, (1962); *Second Report and Order, Docket No. 18051 (Rockford, Ill.)*, 17 F.C.C. 2d 947 (1969). The station may continue to operate on Channel 285A until February 1, 1974, or until such earlier time as upon its request, the Commission authorizes interim operation under special operating authority on Channel 240A, following which it shall submit (within 30 days) the measurement data normally required of an applicant for an FM broadcast station license. On and after the date of which such interim operation is authorized to commence, the Commission will view the request of Station KCHA–FM as a relinquishment of Channel 285A and waiver of any rights it may possess with regard to that channel. Channel 285A will be assigned to Hampton on February 1, 1974, or such earlier date as the Commission authorizes interim operation on Channel 240A to Station KCHA–FM as mentioned above.

10. *Crystal River and Gainesville, Florida (RM–1757, RM–1777 and RM–1790)*. This rule making was instituted on the basis of the conflicting petitions filed by George N. Manthos for assignment of Channel 253 to Crystal River, Florida, and that for assignment of the same channel to Gainesville filed by Capitol City Broadcasting, Incorporated (which later withdrew from further participation in this proceeding). There was also a petition for assignment of Channel 265A to Gainesville filed by James M. Hansford and Frank J. Terrell.[1] To examine the problem further, the Notice and Further Notice herein tentatively proposed assignment of Channel 253 to either Crystal River or Gainesville, Florida, and an assignment of a Class A channel to each community as an alternative channel, Channels 237A and 265A respectively. The Notice requested submission of additional information to aid us in making a final determination (see para. 12, *infra.*). Comments and reply comments were filed by George N. Manthos (Manthos), H. Bent Kelly (Kelly), Good News Broadcasting Company (Good News), James M. Hansford and Frank J. Terrell (Hansford), Jacksonville Broadcasting Company (JBC), Fort Pierce Broadcasting Company (FPBC), and Tri-County Broadcasters, Inc. (Tri-County).

11. The comments by Good News, Kelly and Hansford support the assignment of Channel 253 to Gainesville, and those of Manthos, the assignment of Channel 253 to Crystal River. Hansford also states that, if a Class A channel were to be assigned to Gainesville, it will file an application for the use of the channel. Tri-County urges the assignment of Channel 253 to Dunnellon in exchange for its present Channel 272A,[2] returning the channel to Ocala where it is nominally assigned, and the assignment of Class A channels to Gainesville and Crystal River. JBC urges denial of the requests for the assignment of Channel 253 to Gainesville and Crystal River because of its intention

[1] At the time the petition was filed Mr. Hansford and Mr. Terrell were a partnership. Later, together with a third party, they incorporated under the name of Far More Media, Inc.

[2] Tri-County is the licensee of Stations WTRS and WTRS–FM (operating on Channel 272A) at Dunnellon.

to file a petition for assignment of Channel 254 to Tampa, Florida, and asserts that Class A channels would provide adequate service to both communities.[3] FPBC opposes the JBC comments.

12. In view of the complexity of the problem, the Notice stated that additional information was needed concerning the areas and populations that are presently unserved and underserved within the 1 mv/m contours of proponents' Class C FM stations, if authorized, compared to a Class A station's operating with a maximum facility. Manthos, Good News and Tri-County made their showings for Class C stations operating with 75 kw and 500-foot facilities. Kelly's showing was based on a 100 kw and 1000-foot facility. Although the information submitted does not lend itself to an exact comparison, it appears that, on the basis of equal facilities (75 kw/500 ft), a Class C station at Gainesville would provide a new service to a population twice that which would receive a new FM service from a station at either Crystal River or Dunnellon (approximately 200,000 to 100,000). However, as to providing a first FM service, a station at either Crystal River or Dunnellon would provide a first service to a larger number of people than would a Gainesville station (17,700 or 15,000 compared to 85 persons). Because of insufficient information, no comparison can be made as to second service. In comparing the above Crystal River and Dunnellon stations to a Gainesville station operating with a 100 kw and 1000-foot facility, a Gainesville station would provide a new FM service to a population two and one-half to three times that which would receive such a service from a station located either at Crystal River or Dunnellon (272,000 to 95,000 or 110,000), but it would only provide a first FM service to one-half as many (7,750 compared to 17,750 or 15,000). However, as to a second service, it would provide such service to four times as many persons as a Dunnellon station (22,000 to 5,000). (No data were submitted on Crystal River.) As to Class A stations, a Gainesville station would provide a new FM service to some 90,000 population, while a Crystal River station would provide such service to about 15,000 persons. Although a Gainesville station would not provide a first service, a Crystal River station would provide such service to approximately 4,300 persons. (Since the Dunnellon Class C station would be a replacement for its present Class A station, no information is furnished as to Class A operation.)

13. We have given careful consideration to the various contentions presented by the proponents urging the assignment of Channel 253 to their respective communities. Although there may be merit in them, we are guided by our FM allocation principles which set forth the priorities by which the FM channels are assigned to communities. The priorities are (a) to provide for first FM service to as much of the population of the United States as possible; (b) to provide each community with at least one FM broadcast station; (c) to provide a choice of at least two FM services to as much of the population of the United States; etc. It thus appears that the public interest would best be served if Channel 253 were assigned to Crystal River. A Class C

[3] Since the JBC petition for Tampa (RM-1962) was filed April 19, 1972, 12 days after the date for filing comments, no consideration will be given to the petition in the proceeding herein in accordance with the "cutoff" procedure.

station at Crystal River, operating with a facility of at least 75 kw and antenna height of 500 feet above average terrain, would provide a first FM service to the largest number of people as well as provide for a first local broadcast station to the community. Although a Class C station with a similar facility at Dunnellon would provide a first FM service to population nearly as great as that of a station at Crystal River, the proponent is seeking to improve its present Class A facility with a Class C facility, *i.e.*, it would not provide for a first local FM station. Dunnellon also has a local standard broadcast station whereas Crystal River has none. The assignment of Channel 265A to Gainesville would provide for a third FM station to the community. The fact that there is already intermixture in the community lessens our concern on this score. We will therefore make these channel assignments.

14. The authority for the actions taken herein is contained in Sections 4(i), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended.

15. Accordingly, IT IS ORDERED, That effective March 21, 1973, the Table of FM Assignments (Section 73.202(b) of the Rules) IS AMENDED with respect to the cities listed below to read as follows:

City:	*Channel No.*
Crystal River, Fla	[1] 253
Gainesville, Fla	265A, 279, 288A
Charles City, Iowa	[2] 240A
Hampton, Iowa	[2] 285A
Pella, Iowa	277

[1] Any application for this channel must specify an effective radiated power of 75 kw and antenna height of 500 feet above average terrain or equivalent.

[2] Effective 3 a.m. central standard time, February 1, 1974 (concurrently with expiration of the outstanding license for Station KCHA–FM on Channel 285A at Charles City, Ia.), or such earlier date as Station KCHA–FM may, upon its request, cease operation on Channel 285A at Charles City, Ia.

16. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73R-70

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of FRIENDLY BROADCASTING CO. For Renewal of License of Radio Stations WJMO and WLYT (FM), Cleveland Heights, Ohio	Docket No. 19412 File No. BR-1844 File No. BRH-140

MEMORANDUM OPINION AND ORDER

(Adopted February 7, 1973; Released February 9, 1973)

BY THE REVIEW BOARD.

1. Before the Review Board for consideration is a petition to enlarge issues, filed December 26, 1972, by the Broadcast Bureau.[1] The following issues are requested by the Bureau:

(a) To determine whether Friendly Broadcasting Co. broadcast information on a lottery in violation of 18 U.S. Code, Section 1304, and Section 73.122 of the Commission Rules.[2]

(b) To determine whether station WJMO broadcast programs and/or announcements which aided or gave comfort to illegal gambling activities.

(c) To determine in light of the evidence adduced under Issue A, B & C, whether Friendly Broadcasting Company possess the requisite qualifications to be a Commission licensee. [sic]

(d) To determine whether Friendly Broadcasting Co. has been lacking in candor or made misrepresentations in responding to the Commission's Official Notices of Violations.

2. In support of its claim that good cause exists for the late filing of its petition, the Bureau submits that it did not possess knowledge of facts warranting the requested issues until they were revealed at hearing. Furthermore, claims the Bureau, its petition was filed eight days after receipt of the full text of the transcript of the hearing. The Review Board finds that good cause exists for the Bureau's submission of its petition at this time and will therefore consider the petition on its merits.

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[1] No pleadings have been filed in response to the Bureau's petition.

[2] 18 USC § 1304 reads:

Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating such station, knowingly permits the broadcasting of, any advertising of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than $1,000 or imprisoned not more than one year, or both. Each day's broadcasting shall constitute a separate offense.

Section 73.122(a) of the Commission's Rules reads:

An application for construction permit, license, renewal of license, or any other authorization for the operation of a broadcast station, will not be granted where the applicant proposes to follow or continue to follow a policy or practice of broadcasting or permitting 'the broadcasting of any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes.' (See 18 USC § 1304.)

3. In support of requested issues (a), (b) and (c), the Bureau alleges that eight witnesses testified [3] at hearing that between 1967 and 1971 Station WJMO [4] broadcast programs featuring faith healers, blessers and ministers, which contained information designed to promote the business of the "numbers game", an illegal lottery in Cleveland. Petitioner further asserts that four witnesses testified that the past and present management of WJMO was aware of and, in fact, condoned the programming in question. In addition, contends the Bureau, three of those four witnesses and two other witnesses, including the station's present general manager, testified that WJMO broadcast information relating to numbers operations during the course of stock market reports. In support of its requested issue (d), petitioner refers to allegedly uncontroverted testimony which establishes, the Bureau asserts, that Friendly made misrepresentations in its responses to the Commission's Official Notices of Violations. In response to those Notices, the applicant submitted affidavits purportedly of staff members of WJMO in which the affiants stated that they had been responsible for certain violations of the Commission's Rules and that his operating duties had been reviewed with him. The Bureau maintains that testimony at hearing indicates that the documents submitted by WJMO to the Commission purporting to be affidavits were not in fact affidavits, since they were not properly sworn. Moreover, states the petitioner, the statements contained in the documents were in themselves misrepresentations, in that some operators did not believe they committed the violations, that operating duties had not been reviewed and that the employees signed the statements only in order to retain their jobs.

4. The Review Board is of the view that the Broadcast Bureau's unopposed allegations reflect a fair analysis and evaluation of the testimony adduced in these proceedings. In *United Television Co., Inc. (WFAN–TV)*, 20 FCC 2d 278, 17 RR 2d 738 (1969),[5] we concluded in analogous circumstances that such allegations raise a serious question concerning possible violations of Section 1304 of Title 18 and Section 73.122 of the Commission's Rules, and that appropriate issues should be specified to inquire into these matters and to determine the effect thereof on the qualifications of the applicant. On the other hand, as we stated in *United*, "since the requested issues [(a), (b) and (c)] are essentially founded on alleged violations of Section 1304 of Title 18 and Section 73.122 of the Rules, we will refrain from specifying any issues other than those that pertain to possible violations of those applicable statutory and administrative provisions" (footnote omitted). 20 FCC 2d at 285, 17 RR 2d at 748. We further find that the Bureau has raised a substantial, uncontested question of misrepresentation to the Commission by the applicant. We will therefore add that requested issue.

5. Accordingly, IT IS ORDERED, That the petition to enlarge issues, filed December 26, 1972, by the Broadcast Bureau IS GRANTED

[3] The Bureau also asserts that their testimony was uncontroverted.
[4] WJMO is the standard broadcast facility of Friendly Broadcasting Company (Friendly), the renewal applicant in this proceeding.
[5] The applicant against which issues were added in that case is a corporation wholly owned by the 100% owner of Friendly.

to the extent indicated below, and IS DENIED in all other respects; and

6. IT IS FURTHER ORDERED, That the issues in this proceeding ARE ENLARGED by the addition of the following issues:

(a) To determine whether Station WJMO has broadcast announcements or information concerning a lottery in contravention of Section 1304 of Title 18 of the United States Code, and of Section 73.122 of the Commission's Rules; and, if so, to determine the effect thereof upon the qualifications of the applicant to be a broadcast licensee.

(b) To determine whether Friendly Broadcasting Company has made misrepresentations to the Commission and, if so, the effect thereof on the qualifications of the applicant to be a broadcast licensee; and

7. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence under the above issues SHALL BE upon the Broadcast Bureau, and the burden of proof SHALL BE upon Friendly Broadcasting Company.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73–160

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint of
MR. KILSOO HAAN
Against
KGO, SAN FRANCISCO, CALIF.

ORDER

(Adopted February 7, 1973; Released February 9, 1973)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND HOOKS CONCURRING IN THE RESULT; COMMISSIONER H. REX LEE ABSENT.

1. The Commission has before it an Application for Review filed on November 27, 1972 by Mr. Kilsoo Haan of the ruling of the Broadcast Bureau of October 19, 1972.

2. We have examined the pleadings herein and believe that the Bureau's ruling was correct. Accordingly, pursuant to Section 1.115(g) of the Commission's Rules and Regulations, the Application for Review is DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73–60

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
IMPOUNDMENT OF PROFITS OF STATION WLBT (TV), JACKSON, MISS.

MEMORANDUM OPINION AND ORDER

(Adopted January 17, 1973; Released January 24, 1973)

BY THE COMMISSION: COMMISSIONERS REID, WILEY AND HOOKS NOT PARTICIPATING.

1. On April 6, 1972, the United States Court of Appeals for the District of Columbia Circuit handed down its decision in *Civic Communications Corporation* v. *Federal Communications Commission*, 462 F 2d. 309, ——— U.S. App. D.C. ———, 24 RR 2d 2015, modifying the Commission's order in *In re Lamar Life Broadcasting Co.*, 21 FCC 2d 277, 18 RR 2d 274, released February 2, 1970, and remanding the cause to the Commission for consideration of the issue of whether the net profits of Lamar Life Broadcasting Co., resulting from operation of station WLBT(TV), Jackson, Mississippi, from September 8, 1970 to April 17, 1971, should have been impounded. A brief review of the background of this matter is essential to an understanding of the Commission's task in this proceeding.

2. On December 5, 1969, the Commission released an order vacating the grant of the application (BRCT–326) of Lamar Life Broadcasting Company (Lamar) for renewal of the license of station WLBT (TV), channel 3, Jackson, Mississippi, requested an application from Lamar for a construction permit, and invited competing applications. *Lamar Broadcasting Co.* (*WLBT(TV)*), 20 FCC 2d 635. Lamar was authorized to remain on the air pending establishment of an interim operation. On December 10, 1969, Civic Communications Corporation (Civic), an applicant (BPCT–4305) for regular authority to operate station WLBT(TV), filed a petition requesting that the Commission impound the profits of station WLBT(TV) from December 5, 1969, the date the Commission vacated its grant to Lamar and invited competing applications. By Memorandum Opinion and Order (21 FCC 2d 277, 18 RR 2d 274), the Commission, on January 29, 1970 (released February 2, 1970), denied Civic's request to impound profits, explaining that there was little likelihood of any detriment to Civic or any other applicant nor any advantage to Lamar in permitting Lamar to retain the profits for the short period until an interim operation was established. It is from this order that Civic appealed to the Court of Appeals, whose decision is now before us for implementation.

3. On September 8, 1970, the Commission released an order (adopted September 3, 1970, 26 FCC 2d 100, 20 RR 2d 167), granting the appli-

cation (BPCTI–11) of Communications Improvement, Inc. (CII), for interim authority to operate station WLBT(TV) and simultaneously terminating Lamar's operating authority. We there provide for distribution by the interim operator (which is not an applicant for regular authority) of the net profits from the operation to nonprofit educational broadcasting in Mississippi. On September 16, 1970, the Commission released a Memorandum Opinion and Order (adopted September 15, 1970, 25 FCC 2d 619), providing that if Lamar sought a stay from the Court of Appeals within seven days of the date of release of the order, the Commission's action of September 3, 1970, *supra*, would be stayed until 30 days after the Court acted upon Lamar's motion. Lamar filed a motion for stay with the Court of Appeals on September 23, 1970, and simultaneously requested an immediate decision on the merits from the Court. During the pendency of the motion for stay and for immediate decision on the merits before the Court, Lamar continued to operate station WLBT(TV). The Court did not act until March 17, 1971, when it affirmed the order of the Commission on the merits and dismissed Lamar's motion for stay as moot. Under the Commission's order, released September 16, 1970, *supra*, the effectiveness of the termination of Lamar's operating authority was stayed for 30 days after March 17, 1971 (the day the Court acted); i.e., April 17, 1971. CII, however, was not ready to assume operation of the station on that date and, on May 19, 1971, the Commission adopted an order, released May 21, 1971 (*Communications Improvement, Inc.*, 29 FCC 2d 468, 21 RR 2d 1178), permitting Lamar to continue operation of the station until CII was able to take over the operation, but the Commission ordered the net profits of the station impounded from April 17, 1971, to be distributed by CII in accordance with the latter's undertaking. On June 14, 1971, CII assumed interim operation of station WLBT(TV).

4. In its appeal, Civic and CII suggested to the Court that the profits should have been impounded from (1) June 20, 1969 (the date the Court reversed the Commission's order granting Lamar a regular three-year renewal), or (2) September 5, 1969 (the date the Court denied rehearing), or (3) December 5, 1969 (the date the Commission vacated its grant to Lamar, pursuant to the Court's mandate, and invited competing applications). The Court of Appeals, in the decision which is before us for implementation, considered three possible periods during which it thought that the net profits perhaps should have been impounded. These periods were: December 5, 1969–September 8, 1970 (the period during which Lamar remained on the air until the Commission granted interim authority to CII); September 8, 1970–April 17, 1971 (the period during which Lamar operated the station after interim authority was granted to CII, pending a decision on Lamar's appeal, to the end of the 30-day stay period allowed by the Commission following action by the Court); and April 17, 1971–June 14, 1971 (the period during which Lamar operated after dissolution of the Commission's stay because CII was not able to assume operation until the date CII actually took over). The Court observed that profits for the last period were, in fact, ordered impounded, and upheld the Commission's refusal to impound during the first period. The

Court, however, vacated the Commission's order as to the middle period and remanded the case to the Commission for consideration as to whether the net profits from September 8, 1970, to April 17, 1971, should have been impounded. In so doing, the Court held that the reasons assigned by the Commission for denial of all impounding in its February 2, 1970, decision do not necessarily support application of the order to the September 8, 1970 to April 17, 1971 period, because of the length of the period and because it resulted from Lamar's own decision to contest in court the award of interim operating authority to CII.

5. Our major concern, like that of the Court, is that, in the interim operation of station WLBT(TV), no applicant for regular authority should enjoy an unfair advantage over the others, nor should any applicant suffer a disadvantage solely as the result of the interim operation. But for its appeal, Lamar's stewardship of the station would have terminated September 8, 1970, assuming, for the moment, that CII had been in a position to have taken over operation of the station. After that date, Lamar was a licensee in name only, and its operation of the station was in the nature of a trusteeship for CII. Operation by Lamar as a "trustee" for CII was necessary in order to prevent cessation of the operation of the station with the resultant loss of service to the public. Consequently, upon further consideration and in the light of the Court's opinion, we now find that Lamar was entitled, in this period, to recoup its reasonable and legitimate expenses, but has no claim on the net profits. Lamar, it must be remembered, has the status of an applicant for a "new" station, not that of one seeking renewal of a license. Retention of the net profits by Lamar from the date its operating authority as a licensee terminated would give it an unfair advantage over the other applicants. First, it would provide some of the wherewithal to finance Lamar's expenses through the comparative hearing process. We think that it is obvious that, under these circumstances, Lamar would not be competing on equal terms, or terms as nearly equal as can be, with the other applicants, but would have a decided financial edge. Moreover, Lamar should not be allowed as "trustee" to use the profits of the station during the pendency of its appeal to the courts to defray the costs of the appeal. Here, also, the other parties work at a disadvantage. We have concluded, therefore, that, for the reasons stated, Lamar is not entitled to the net profits after September 8, 1970, and these funds must be remitted to CII for distribution. Accordingly, we have come to the conclusion that impoundment for the period in question is in the public interest, anything which we may have decided previously to the contrary notwithstanding. A brief resume of the events antedating this decision is important to an understanding of the problems which arise out of the decision and remain to be resolved.

6. Following the Court's decision, Lamar, on April 25, 1972, requested an opportunity to present to the Commission its views as to the reasonableness and propriety of impounding net profits of station WLBT(TV) during the period from September 8, 1970, through April 17, 1971. This opportunity was granted to Lamar on May 8, 1972, and there followed a sequence of letters and pleadings by Lamar and CII. Four basic pleadings set out the respective positions of the parties: (a)

petition of Lamar upon reconsideration pursuant to court remand, filed June 8, 1972; (b) response of CII, filed July 7, 1972; (c) reply of Lamar to the CII response, filed July 28, 1972; and (d) supplemental response of CII to Lamar's reply, filed August 11, 1972. These pleadings contain the basic positions of the parties with respect to whether or not there should be impoundment and, if so, the basis upon which the amount thereof is to be computed. Briefly stated, there is very little agreement between Lamar and CII. In the following paragraphs, we have set forth the questions which engage the parties with respect to how the net profits to be impounded are to be computed.

7. Lamar states, while insisting that, for many reasons, the net profits for the period in question should not be impounded, if the Commission decides to order impoundment, the net profits for the period should be net profits computed for Federal income tax purposes, subject to the following adjustments:

(a) Less income not attributable to the operation of station WLBT;
(b) Less interest on short-term investments by Lamar;
(c) Less income received from rental of space on the WLBT tower to other;
(d) Less accountant's fees for determination of net profits to be impounded from September 8, 1970, through April 17, 1971;
(e) Less interest on Lamar's average working capital used in the operation of WLBT during the impoundment period, at the legal maximum rate for corporations; i.e., 15%;
(f) Less management fees for operation of WLBT for the benefit of CII and its beneficiaries during the impoundment period; i.e., 10% of gross sales;
(g) Less Federal income tax penalties which Lamar may incur in 1972 as the result of the two-year delay in ordering impoundment;
(h) Less lease rental of $30,000 per month, on the same terms and conditions as contained in the lease agreement between Lamar and CII, dated June 11, 1971;
(i) Plus depreciation, interest and legal fees during the impoundment period, allocable to Lamar's efforts to retain its license;
(j) Plus interest on net profits for the impoundment period from September 8, 1970, through April 17, 1971, at 15%. Lamar states that items (e) and (j) must be allowed or disallowed together, but not either alone.

8. Before discussing the above problems, we point out that there are other areas of dispute, one of which we think it imperative to resolve at the outset. The parties are in disagreement as to whether CII may deduct anything from the money turned over to it by Lamar for such things as repayment of CII's debts or whether CII is a mere conduit through which every cent of the impounded funds pass to the Mississippi educational broadcasting interests. Consistent with CII's specific undertaking [1] to donate "the entire net profits" to nonprofit organizations and our order in *Lamar Life Broadcasting Co.*, 26 FCC 2d 100, 10 RR 2d 167, as well as CII's own arguments to the Court of Appeals, maintaining that the people of Mississippi have "an equitable claim" to the profits, we here hold that CII is a conduit through which the funds are to be distributed to the beneficiaries. CII is, in every sense, a trustee for the beneficiaries and we are not persuaded

[1] *In Communications Improvement, Inc.*, 29 FCC 2d 468, 21 RR 2d 1178, the Commission required that the profits which it ordered to be impounded be deposited in an escrow account and provided that: "Upon the execution of a satisfactory agreement between Lamar and CII, any funds in the escrow account will be turned over to CII *for distribution* in accordance with its representations to us." (Emphasis supplied). CII has represented that it would donate the *entire net profits* to its beneficiaries. See *Lamar Life Broadcasting Co., et al.*, 26 FCC 2d 100, 20 RR 2d 167, par. 18. In its supplemental response in this proceeding, in paragraph 7, CII concedes that it is a mere conduit as to the April 17–June 14 profits. We are not convinced that CII may be treated as a "mere conduit" for one period and not for another.

that, under these circumstances, it is free to divert any part of the impounded funds toward reimbursement for its expenses. There is, however, one exception. We are concerned with the period of time during which Lamar operated the station while its appeal was pending before the court. We think that CII is entitled to retain, out of the monies to be paid over to it by Lamar for this period, its reasonable, prudent and necessary costs incurred by reason of the appeal before the Court of Appeals. This is necessary, we believe, because CII must, in one way or another, recover the costs incurred on behalf of its beneficiaries to protect the rights of those beneficiaries to receive the funds. This is a cost properly chargeable to the beneficiaries because, without CII's defense on appeal, the right to the trust funds might not have been established. We rule, therefore, that these expenses may be deducted by CII from the funds paid over to it by Lamar, but CII may not retain any part of these funds for any other purpose. A determination of the extent, if any, to which CII may use net profits from its operation of station WLBT for purposes such as capital expenditures is beyond the scope of this proceeding.

9. Among the other problems is one relating to disputed insurance claims, arising out of an apparent duplication of insurance coverage when CII assumed operation of station WLBT. The dispute involves an alleged attempt by Lamar to offset against profits an amount for the disputed duplicated insurance premiums. This dispute is not properly before us in this proceeding because the amount in dispute is sought to be charged against profits for the period April 17, 1971, to June 14, 1971, during which period profits have already been ordered impounded and it is not, therefore, for decision here. Moreover, the parties seem to be in accord that, as with any other matter arising under a lease agreement, this is a matter of private law which should be adjudicated, if necessary, by a local court in a civil proceeding and is not for adjudication by the Commission. We, therefore, decline to pass upon this dispute and leave it for resolution by the parties in private litigation if it cannot be otherwise resolved.

10. It is apparent that the parties are at issue on the items described in paragraph 7, *supra*, which are to be considered in connection with the computation of net profits to be paid over to CII in trust for the benefit of Mississippi educational interests. We, therefore, rule on these issues by way of laying down guidelines for the computation, since no specific figures have been furnished.

(a) We allow the deduction of income to Lamar which was not attributable to the operation of station WLBT, but if Lamar has borrowed funds for projects not attributable directly to the operation of WLBT, the amount of interest paid on such loans, if any, which has been charged against gross income of WLBT to arrive at net profit, must be added back into net profits.

(b) We allow the deduction of interest earned on short-term investments by Lamar.

(*c*) We allow the deduction of income received from rental of space on Lamar's tower to others. CII contends that if this is allowed, an unspecified portion of tower expenses should not be allowed in computing net profits. We agree. To the extent that tower expenses have been deducted from gross income to arrive at a net profit figure, a

portion (in an amount to be determined by negotiation between the parties) must be added back to net profits.

(d) We allow the deduction of accountant's fees paid by Lamar for the necessary expenses of determining the amount of net profits which are to be impounded.

(e) We disallow the deduction of interest on Lamar's average working capital during the impoundment period. This is income directly attributable to the operation of station WLBT and, if Lamar insists upon recognition of these funds as being due it, it must pay it over to CII in any event as a part of impoundable net profits.

(f) We disallow the deduction of a management fee for Lamar for the impoundment period. Lamar's officers and management personnel were compensated for whatever functions they performed and this compensation is taken into account in arriving at a net profit figure. Management functions were performed by Lamar, during the pendency of the appeal, for its own benefit with the hope, if not expectation, that it would retain its operating authority.

(g) Although there is question as to whether Federal income tax penalties may accrue as a result of delay in the impoundment, should such penalties actually accrue, we will allow the deduction provided that the penalties are not the result of lack of diligence or earnest pursuit of its rights by Lamar. Lamar, in order to claim the deduction, must prove the penalties accrued despite all of its efforts to prevent such accrual and it must prove the amount thereof.

(h) We allow the deduction of a monthly lease rental on the same terms and conditions as those obtaining under existing lease arrangements between the parties. The amount may be adjusted by agreement of the parties if there is a dispute as to the existing terms and conditions.

(i) We allow the addition of depreciation, interest and legal fees charged by Lamar for the impoundment period allocable to its efforts to retain the license of WLBT.

(j) We disallow the addition of interest on net profits for the impoundment period, for we have disallowed the deduction of interest on average working capital and we believe that it would be inequitable to allow one and not the other.

11. We believe that the foregoing judgments represent a fair evaluation of the method of computing the amount of profits to be made available for the use of the beneficiaries. We do not, however, rule out such adjustments as may be agreed upon by both parties and we, in fact, encourage the parties to effect a settlement by agreement as expeditiously as conditions will permit. A final accounting and report is to be made to the Commission in this matter within ninety (90) days after the date of release of this order.

12. In accordance with the foregoing, IT IS ORDERED, That the net profits of station WLBT, to be computed as indicated herein, ARE IMPOUNDED, from September 8, 1970, through April 17, 1971, and ARE TO BE PAID to Communications Improvement, Inc., IN TRUST and for the benefit of nonprofit educational broadcasting interests of the State of Mississippi.

13. IT IS FURTHER ORDERED, That Communications Improvement, Inc., DISBURSE such funds to the beneficiaries no later than sixty (60) days after receipt of the same from Lamar Life Broadcasting Company.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73R–38

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of JEFFERSON PILOT BROADCASTING CO. (WBTV), CHARLOTTE, N.C. For Construction Permit	Docket No. 18880 File No. BPCT–4168

ORDER

(Adopted January 19, 1973; Released February 7, 1973)

BY THE REVIEW BOARD: BOARD MEMBER KESSLER ABSENT.

1. The Review Board having under consideration petition for leave to amend to update application pursuant to Section 1.65 of the Rules, filed on November 3, 1972, by Jefferson Pilot Broadcasting Company;

2. IT APPEARING, That no objections to acceptance of the amendments have been filed within the time allowed therefor;

3. IT IS ORDERED, That the above petition for leave to amend IS GRANTED and the amendment therein IS ACCEPTED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

109–027—73——7

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of
KOPS-MONAHAN COMMUNICATIONS, INC., ASSIGNOR
and
SCOTT BROADCASTING CO. OF PENNSYLVANIA, INC., ASSIGNEE
For Assignment of License of WTRY, Troy and WTRY-FM, Albany, N.Y.

DECEMBER 18, 1972.

On December 13, 1972, the Commission approved the above assignment of license with Commissioner Johnson dissenting and issuing the following statement:

OPINION BY COMMISSIONER JOHNSON ON WTRY-AM, WTRY-FM ASSIGNMENT ACTION

On December 13, 1972, the Commission approved the assignment of license of WTRY-AM, Troy, WTRY-FM, Albany, N.Y., from Kops-Monahan Communications, Inc., to Scott Broadcasting Company of Pennsylvania, Inc.

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

Today the Federal Communications Commission approves the assignment of radio station WTRY-AM, Troy, New York, and WTRY-FM, Albany, New York, from Kops-Monahan Communications, Inc., to Scott Broadcasting Co. of Pennsylvania. This assignment raises three major problems—problems to which the majority's opinion scarcely alludes.

First, with this assignment, Scott Broadcasting will acquire its seventh AM and its fourth FM station. All of these stations broadcast to listeners in the mid-Atlantic portion of this country. Section 73.35 (b) of our rules precludes one individual or institution from owning more than one AM broadcast station if the resulting multiple ownership violates the public interest in a diversity of broadcast views. Section 73.240(a)(2) applies the same prohibition to FM stations. It is true, of course, that our rules state that ownership of more than seven AM or FM stations constitute a *per se* violation of the public interest. But that *per se* rule clearly does not mean that ownership of more than one, but less than seven, such stations cannot constitute a violation of the public interest standard.

The majority does not even refer to these rules. It makes *no* inquiry into the question whether Scott Broadcasting's ownership of seven AM and four FM stations—all in one clearly defined section of the country—poses any problems of concentration of media control. Such an inquiry might well indicate the need for a hearing in order to determine the extent of the assignee's control. And it is well established that this Commission does not like evidentiary hearings. Here, as in the past, see my dissenting opinion in *WDSU–TV, Inc.*, ——— FCC 2d ——— (1972), the majority's desire to avoid inquiry leads to the emasculation of our multiple ownership rules.

The second problem presented by this case is the fact that one of the assignee's current licensees is under attack by a petition to deny filed by a coalition of black community leaders in Harrisburg, Pennsylvania. That petition challenges Scott Broadcasting's ascertainment of community needs with respect to WFEC–AM; the petition alleges further that the licensee has discriminated against minority groups in both its programming and its employment practices.

Despite these serious challenges to Scott Broadcasting's basic qualifications as a licensee, the majority, rather than deferring action in the instant case, virtually ignores the petition to deny and lets Scott Broadcasting acquire still other radio interests. It is as if the majority has finally admitted that it does not take seriously community group oppositions to license renewals. For, if this Commission's policy were otherwise, it would be patently absurd to permit this assignee to win more radio stations when, at some future date, this Commission might well find the assignee unqualified to own those licenses it now holds.

Finally, the majority is not troubled by the fact that the assignee proposes to broadcast less than 5% of non-entertainment programming other than news and public affairs on both of its newly acquired stations. I have repeatedly expressed the view that a station which fails to broadcast less than 5% news, 1% public affairs, and 5% other non-entertainment programming cannot possibly be serving the public interest. *See, e.g.*, my dissents in *Pennsylvania-Delaware Renewals*, 36 FCC 2d 515, 549 (1972); *Washington Renewals*, ——— FCC 2d ——— (1972). Other Commissioners, such as former Commissioner Kenneth Cox, see our dissenting statement in *Renewal of Standard Broadcast and Television Licenses: An Oklahoma Case Study*, 14 FCC 2d 1 (1968), have been of this opinion as well, but the majority has never agreed. Nor does it agree today.

I dissent.

F.C.C. 73–122

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re LAFOURCHE COMMUNICATIONS, INC., LAFOURCHE PARISH (WARDS 1, 2, 3, 5), LA. Petition for Special Relief Filed Pursuant to Section 76.7 of the Commission's Rules	CSR–299 (LA052)

MEMORANDUM OPINION AND ORDER

(Adopted January 31, 1973; Released February 8, 1973)

BY THE COMMMISSION.

1. On November 22, 1972, Lafourche Communications, Inc., filed a "Petition for Special Relief", pursuant to Section 76.7 of the Commission's Rules, requesting that the Commission authorize its existing cable television operations in certain portions of Lafourche Parish, Louisiana. The petition is unopposed.

2. On April 16, 1966, Lafourche was granted a franchise for cable television operations at the City of Thibodaux, Louisiana. On December 6, 1968, Lafourche filed a notification of proposed cable service, pursuant to former Section 74.1105 of the Rules. This notice was unopposed. Signals to be carried at Thibodaux included:

WAFB–TV	(Channel 9, CBS)	Baton Rouge
WYES–TV	(Channel 12, ETV)	New Orleans
WDSU–TV	(Channel 6, NBC)	New Orleans
WVUE	(Channel 8, ABC)	New Orleans
WWL–TV	(Channel 4, CBS)	New Orleans
WBRZ	(Channel 2, NBC)	Baton Rouge
WGNO–TV (formerly WWOM–TV)	(Channel 26, Ind)	New Orleans
KATC	(Channel 3, ABC)	Lafayette
KLFY–TV	(Channel 10, CBS)	Lafayette

In May, 1969, Lafourche filed a petition pursuant to former Section 74.1107 of the Rules to carry the three distant signals: WGNO–TV, KATC, and KLFY–TV. This petition was also unopposed, and on July 2, 1969, the Commission granted the requested authorization. *Lafourche Communications, Inc.*, 18 FCC 2d 529 (1969). The May, 1969 petition, while specifically requesting authorization for Thibodaux, also made reference to Lafourche Parish but without a specific request for authorization to operate in the unincorporated areas of the Parish. In March, 1970, Lafourche began its operations by providing service to subscribers in Thibodaux and in Wards One, Two, Three and Five of Lafourche Parish. In October, 1971, Television Broadcast Station WRBT (Channel 33, ABC), Baton Rouge, Louisiana, began operations, and, in December, 1971, Lafourche added this signal to

both the Thibodaux and Lafourche Parish systems. On July 20, 1972, Wometco Communications, Inc., purchased Lafourche Communications, Inc., and upon a review of the total operations, discovered that Commission authorization had never been specifically obtained for the existing cable service in Lafourche Parish. This petition was then filed to rectify the omission.

3. In its petition, Lafourche's failure to secure an appropriate Commission authorization to operate in the Parish is ascribed to simple inadvertence. Although a separate franchise was awarded to Lafourche to provide cable service to residents of the Parish, no thought was given to the necessity for specifying the Parish, as well as Thibodaux, in the earlier notification and petition filed with the Commission. The areas of the Parish served by the system are unincorporated and immediately surround the city of Thibodaux; and apparently it was not then considered a distinct governmental unit requiring a separate authorization.[1] Lafourche asserts that special relief now will prevent disruption of service to Parish subscribers, that Thibodaux and the surrounding areas of the Parish are so interrelated that the inadvertent failure to obtain separate authorization is understandable, and that good faith was demonstrated by bringing the omission to the Commission's attention. The City of Thibodaux has a population of approximately 15,000 persons of whom 2,441 are cable subscribers. The city is surrounded by Lafourche Parish where the cable system's headend is located. Lafourche is currently providing service to approximately 1,100 Parish subscribers located along the main trunk line from the headend to Thibodaux.

4. At the time of filing of Lafourche's earlier notification and petition, Thibodaux and the surrounding area of Lafourche Parish were not located within the 35-mile zone of any operating television station, and the signals carried on the Thibodaux system were consistent with the then existing rules and the interim processing procedures. But for Lafourche's failure to file the proper notification and petition for Lefourche Parish, its signal carriage there, which is identical to that in Thibodaux, also would have been consistent with the rules and procedures applicable when the system began service to Parish subscribers. However, Television Broadcast Station KHMA (Ch. 11, Ind.) Houma, Louisiana, began operations on March 1, 1972, and its 35-mile zone includes Thibodaux and the portions of Lafourche Parish where Lafourche is presently operating; hence, these areas are now within a smaller television market, and carriage of stations WBRZ, WGNO–TV, KATC, KLFY–TV, and WRBT would now be inconsistent with Section 76.59 of the Rules.

5. In *Coldwater Cablevision, Inc.*, 31 FCC 2d 17 (1971), we granted relief similar to that requested here. The facts are virtually identical. As in *Coldwater*, we are not persuaded that a grant of the request would create any meaningful question of impact upon the structure of broadcast television in the market, especially since the signals are being carried and will continue to be carried in the principal community of Thibodaux, and have already been carried in the Parish

[1] Both share the same municipal and public utility services, several Parish government offices are located in the City and they operate a unified school system.

for almost three years. It should be noted that Lafourche's request is unopposed, and that KHMA has informed Lafourche that it has no objection to its continued operation in Lafourche Parish. Moreover, as in *Coldwater*, since the system headend is located in the Parish, it would be technically impractical or impossible to delete signals in the Parish between the headend and Thibodaux and still carry the authorized signals in the city. In *Coldwater*, *supra*, at 19 we concluded:

> No useful purpose would be served in insisting upon strict compliance with our rules and procedures in this situation. To deny this requested service would deprive one set of subscribers the programming to which they have become accustomed over a number of years and for no very good reason.

We believe that the public interest will best be served by reaching the same conclusion here.

6. We recognize that Wards have been designated by the Lafourche Parish authorities as the appropriate unit for franchising there, and we find no objection to the use of these areas as a means of designating the extent of our authorization. Since Lafourche was operating in Wards One, Two, Three, and Five, prior to March 31, 1972, we will authorize continued operations in the unincorporated areas of those sectors. Of course, pursuant to Section 76.11(b) of the Rules, the Thibodeaux and Lafourche Parish systems will be required to obtain certification for their existing operations on or before March 31, 1977.

Accordingly, IT IS ORDERED, That the "Petition for Special Relief" filed November 22, 1972, by Lafourche Communications, Inc., IS GRANTED to the extent indicated above.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

F.C.C. 73-102

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of MUSKEGON HEIGHT BROADCASTING CO., INC., MUSKEGON HEIGHTS, MICH. For CP for new FM Station	File No. BPH-7763

JANUARY 23, 1973.

MUSKEGON HEIGHTS BROADCASTING CO., INC.,
c/o Mr. William E. Kuiper, Post Office Box 178,
Muskegon Heights, Mich.

GENTLEMEN: This is in further reference to your application (File No. BPH-7736) for a construction permit for a new FM station in Muskegon Heights, Michigan.

By letter of September 7, 1972, we stated that your proposal raised substantial questions concerning (a) the efficient utilization of FM frequencies, and (b) an undue concentration of control of aural broadcasting in the southwest quadrant of the Lower Peninsula of Michigan. We indicated therein that the 1 mV/m contour of your proposed facility would overlap the 1 mV/m contour of commonly owned station WFUR-FM, Grand Rapids, Michigan, if either station were to operate at maximum values permitted under the rules. We further noted that a grant of your application would result in the seventh broadcast facility for the principals in your corporation, i.e., four standard broadcast stations and three FM stations, all located in four communities within the same general region of Michigan. You were requested to comment on these matters.

In response to this letter, you represent that potential transmitter sites exist for both the proposed station and WFUR-FM which could be utilized at some future date and which would allow for full implementation of facilities. Maximum operating power and antenna heights above terrain could be established at these potential sites without resulting in 1 mV/m contour overlap between the stations, without creating mileage separation problems with existing stations, and which would provide principal city coverage to the respective communities of license. With respect to the question of regional concentration of control, you have shown that numerous broadcast facilities exist in the area which are owned by other interests. In 1961, an application by Muskegon Heights Broadcasting Company for a construction permit for a new AM station in Muskegon Heights was designated for hearing on issues concerning, among other things, an undue regional concentration of control of AM broadcasting. The Hearing Examiner concluded that a grant of the application would not result in an undue concentration of control of mass media. 33 FCC 2d 660 (1962). This was based, in part, on the fact that there were 15

other standard broadcast transmission services and a minimum of five and a maximum of 21 reception services in certain communities in the region. Since 1962, eight FM stations and one television station have been added to these communities. Additional stations, especially FM, have also commenced operation in other communities within the same general area and provide competition and service to those communities in which you operate stations. Furthermore, there are a number of daily and weekly newspapers serving the communities involved and CATV systems are either operating in, or planned for, Muskegon, Muskegon Heights, Grand Rapids, Kalamazoo and Dowagiac. In addition to these factors, you represent that there will be no joint advertising rates among the stations in the four communities in which you have media interests, that no more than 10–15 percent of advertisers on one station will be advertisers on the other stations, and that stations in each community will be operated and programmed independently of the stations in the other communities.

In view of the foregoing, we believe that a grant of your application is warranted without the necessity for an evidentiary hearing to determine whether the proposed operation would be an efficient utilization of the assigned frequency and/or would result in regional concentration of control of broadcast media. Accordingly, IT IS ORDERED, that your application for a new FM station at Muskegon Heights, Michigan, IS HEREBY GRANTED.

Commissioner Johnson dissenting and issuing a statement; Commissioner H. Rex Lee dissenting; Commissioner Wiley concurring in the result.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

Dissenting Opinion of Commissioner Nicholas Johnson

Last September, Messrs. William E. Kuiper, Sr. and William E. Kuiper, doing business as the Muskegon Heights Broadcasting Company, brought their application for a construction permit for a new FM station at Muskegon Heights, Michigan to the attention of this Commission.

Because the Kuipers also operate (and own 100% of) stations WKJR(AM), Muskegon Heights, WFUR and WFUR(FM), Grand Rapids, WDOW and WDOW(FM), Dowagiac, and WKPR(AM), Kalamazoo, the Commission notified the Kuipers that it intended to hold a hearing on their application, specifying an issue of undue concentration of control of mass media in the southwest quadrant of the lower peninsula of Michigan.

In addition, the Commission noted that, due to a potential overlap of contours with the Kuipers' station WFUR(FM) in Grand Rapids (which would violate our duopoly rules) the new facility at Muskegon Heights would have to be operated at something less than its maximum authorized power, thereby creating another serious question: the efficient utilization of the airwaves.

Whenever such a prehearing letter is adopted, an applicant is, of course, given the opportunity to respond with any justification he can muster for the activities or circumstances that first required a hearing.

If the Commission is satisfied with his response, it can rescind its order. If any major areas of concern remain open, however, it is the Commission's responsibility to continue with plans for an evidentiary hearing.

The Kuipers' response to their prehearing letter in this instance was trivial at best, containing little more than a few comic hypotheticals and unverified opinions about the current and potential "effects" of their expanding regional control. Inexplicably, the majority today reverses its previous decision, basing its "reasoning" on that response alone. Since I search the record in vain for any justification that would obviate the need for such clarifying facts as would be gathered in an evidentiary hearing, I must dissent.

Multiple ownership and regional concentration of control should be areas of great concern in a field that combines a severely limited access with such an enormous potential for abuse. Broadcasters alone, among the various media, have virtually instantaneous access to the minds of the people of this country, either nationwide (through our radio and television networks) or in any particular city or region of influence. Despite this state of affairs, it is a sad fact that we have allowed a huge percentage of our most important media to be brought under the control of no more than a handful of large corporations. See generally N. Johnson and J. Hoak, "Media Concentration: Some Observations on the United States Experience," 56 *Iowa L. Rev.* 267 (1970).

There are different types as well as different degrees of concentration of control of the mass media. The more common types, of course, have not been entirely ignored by this Commission. Concern for national patterns of ownership and control have led to Commission rulings on such matters as the number of television licenses that can be held by each network, the ownership by any licensee of more than seven stations of any single type (the "7–7–7" rule), the number of VHF facilities a licensee may own (5 of the 7 TV stations), or the number of television facilities in the top fifty markets.

Another type of concentration that has concerned the Commission has been of a strictly local nature, and rules and decisions have been handed down which deal with multimedia combinations in single or immediately contiguous markets, where a licensee will own a TV–AM–FM combination in a market along with the only afternoon newspaper in the county. See, e.g., *Chronicle Broadcasting Co.*, 17 F.C.C. 2d 245 (1969).

Yet mere cognizance of these problems, and a certain degree of objectivity in some of the rules, has not prevented the Commission from ignoring or abusing the important public interest standards that should prevail on such delicate issues. Even in what should be the most obvious areas of ownership concern the Commission has done little but encourage the consolidation of media control in the hands of the wealthy and the powerful. See, e.g., the changes wrought by the new *Multiple Ownership Rules*, 34 F.C.C. 2d 889 (1972), in which the Commission majority, without consulting either the Justice Department's antitrust division or the House Banking Committee, gave American banks the right to increase their broadcast holdings (in a diverse variety of interests) from 1% to 5% with no apparent scrutiny of their activities. See also the *Assignment of WDSU–TV to Cosmos Broadcasting Co. of Louisiana*, — F.C.C. 2d ———, ——— P & F R.R. 2d

——— (November, 1972), in which the 7–7–7 rules were "interpreted" to allow one individual to acquire a greater than 1% interest in his *eighth* VHF station and one bank to acquire a significant interest in its *ninth!*

A third type of media concentration—the type involved in this case—is even more often ignored or disregarded by the Commission majority, despite its obvious importance, because it is much less susceptible to easy quantitative analysis. Undue *regional* concentration can involve far fewer than the maximum "7–7–7" broadcast holdings now "allowed" individual licensees.* Unfortunately, that subtlety is lost on the majority of the members of this Commission, as they leap ever faster to grant, assign and renew licensees in cases flagrantly violative of our public trust.

The addition of this FM facility to the Kuipers' "stable" adds yet another voice to their aural blanket of one of our top fifty media markets, containing more than 709,000 total households. ARB Data for Grand Rapids/Kalamazoo stations, 41 *TV Factbook* 392–b (1971–72).

In my dissent to a similar previous action, in which a Kentucky broadcaster was allowed to purchase his tenth radio station in the eastern half of the state of Kentucky, I noted that the question that must be addressed in these cases is not the total population of the region involved, but rather the impact of the regional concentration upon the people residing in that region. *Assignment of Station WNVL*, 21 P & F R.R. 2d 77 (1971).

It is not enough merely to argue, as the applicant does here, that the presence of other media interests in the region is sufficient to offset the damage to the public interest that would accrue from the ownership of masses of outlets by a single owner. That is his opinion, at best an *allegation* of "fact," to be weighted along with a number of other considerations in the context of a hearing. In no way does it represent a rational grounds for abandoning some deeper inquiry. No one is foolish enough to believe that one man can own all the media in a region the size of this one. Does that mean we are to abandon any standard at all because the applicant has "proven" that he owns only 25 or 30% of its radio voices? The full thrust of our Rule provides that:

> No license . . . shall be granted . . . if the grant of such license would result in a concentration of control of standard broadcasting in a manner inconsistent with the public interest, convenience or necessity. In determining whether there is such a concentration of control, *consideration will be given to the facts of each case* with particular reference to such factors as the size extent and location of areas to be served, and the number of people served, classes of stations involved and the extent of other competitive service to the areas in question. [Emphasis added.]

*Alas, originally the "7–7–7" doctrine was meant to constitute a *per se* violation, not a "maximum allowable" standard. In the *Cosmos* case cited above, however, the primary licensee was acquiring its fourth VHF in a major market, three of which were located so close to one another that their predicted Grade B contours actually appeared to overlap, in flagrant violation of Rule 73.636(a)(7). The majority granted the transfer without batting an eyelash in the direction of the public interest, claiming the licensee had not yet traversed the "standard" set out in the Rules. But compare this reasoning with the language of the Rule itself, which instructs the Commission to determine the existence of a concentration of control, giving weight to "the facts of each case," but should "in any event consider that there would be such a concentration . . . contrary to the public interest" for any licensee or any of its stockholders, officers or directors to have "a direct or indirect interest" in more than seven stations. 47 CFR 73.636(a)(2).

I had generally been under the impression that, where such a large number of stations are involved in such a small region, the "consideration" called for in the Rule should be something more than a blind acceptance of the representations of the party seeking to avoid its application. See my dissent in *Times Herald Printing Co.*, 25 F.C.C. 2d 984 (1970). To refuse to hold a hearing on this issue merely perpetuates the "almost total abdication of responsibility for media concentration" I've pointed out in the past as endemic to this Commission majority. *WNVZ*, 21 P & F R.R. 2d 77, at 79.

As if the concentration issue alone were not enough, the majority also reverses itself on the issue of "efficient use of the airwaves" in this case, originally prompted by the Kuipers' efforts to evade the letter and spirit of our duopoly rules.

The duopoly rules specifically provide that stations which are commonly owned cannot have overlapping signals. 47 CFR 73.35 (1970). Although this rule too has been waived (like every other significant technical rule we are obliged to enforce), the Commission has generally been stricter here, holding even the tiniest overlap of contours as sufficient reason, in some cases, for rejecting an application for a new or assigned station. See, e.g., *Quinnipiac Valley Service, Inc.*, 27 F.C.C. 2d 66 (1971), in which the Commission refused to permit waiver for an overlap of just 3.6% of the total area served by two radio stations, where the principal involved owned half or less of each station.

In the instant case, the Kuipers will own 100% of the new station as well as 100% of nearby station WFUR(FM), Grand Rapids. If this new station were to operate at its full authorized power, its 1 mV/m contour would overlap with that of WFUR, thus causing a violation of the duopoly rule that would almost certainly have resulted in a refusal of this Commission to grant him the new station. The mere fact that he chooses to specify an operation level lower than the maximum allowable for this assignment therefore avoids the almost certain *per se duopoly* violation, but it does not negate the fact that the resulting underutilization of the frequency still poses a problem of the public interest. It deprives some members of that public of a service they would otherwise enjoy if this station were not under common ownership with an adjacent facility.

Applicant's response to his prehearing letter on this issue was as clever as it was absurd: Problem? What problem? All I need do is move each of my transmitters, at some future date, about four or five miles from their current sites, and the inefficiency would disappear! Note that he was not saying he *would* move the transmitters—only that *if* he did, there would no longer be any problems. Yet, incredibly, the Commission majority has bought this argument, thereby subverting its hearing procedure, by which such important, complicated issues are to be weighed rationally.

I dissent.

F.C.C. 73-134

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Protest to Assignment of
LICENSE FOR RADIO STATIONS WJAS-AM AND FM, PITTSBURGH, PA., FROM NATIONAL BROADCASTING CO., INC. TO GOLDEN TRIANGLE BROADCASTING CO., INC. AND CONSO-CONSOLIDATED, INC.

JANUARY 31, 1973.

DEAR ———: This refers to your recent letter to the Commission protesting the pending assignment of license application for radio Stations WJAS-AM & FM, Pittsburgh, Pennsylvania from National Broadcasting Co., Inc. to Golden Triangle Broadcasting Co., Inc. (WJAS-AM) and Conso-Consolidated, Inc. (WJAS-FM). You have objected to the assignee's proposals that would eliminate the current "All Talk" format of the subject stations.

We are aware that NBC has operated WJAS-AM & FM as primarily "All Talk" with little musical programming. The Bureau has received several letters from Pittsburgh area listeners who also object to the assignee's decision to eliminate this "All Talk" format. In response to a Bureau letter dated September 19, 1972, the assignee has defended its musical format proposals with the following reasoning:

1. Even though the subject stations were owned by NBC and utilized the extensive newsgathering facilities of the network, the stations have experienced a history of substantial financial losses with the present "All Talk" format.

2. Station KDKA-AM, Pittsburgh has provided extensive competition for the subject stations by programming 13 hours per day of a similar talk format; the assignee feels that without the financial strength that NBC enjoyed, it could not effectively compete with the talk format of KDKA.

3. The public affairs programming that listeners enjoy on WJAS-AM & FM, will to a substantial degree be continued by the assignee. In addition, the assignee has entered into two detailed "agreements" with local citizens organizations that will assure continued community involvement by the assignee through its public affairs programming. These two groups are: the Black Policy Board and the local chapter of the National Organization of Women.

Based on the above showing of loss of income through the talk format and the availability of such a format on KDKA, the Commission finds that the assignee's proposals to change the existing formats for WJAS-AM & FM will serve the public interest. The assignee's programming proposals will clearly provide Pittsburgh with substantial public affairs programming and with the existence of the "agreements" between the assignee and community groups, continued involvement in community needs and interests will be assured.

Therefore, the application to assign the licenses for radio Stations WJAS-AM & FM, Pittsburgh, Pennsylvania has been found to

be in the public interest, and accordingly the Commission has this day granted the subject application.

Your interest in this matter has been appreciated.

Commissioner Johnson dissenting.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re
RENEWALS OF BROADCAST LICENSES FOR NORTH CAROLINA AND SOUTH CAROLINA

DECEMBER 20, 1972.

Staff action of December 6, 1972 reviewing Broadcast licenses for North Carolina and South Carolina, approved.

DISSENT TO NORTH CAROLINA-SOUTH CAROLINA BROADCAST LICENSE RENEWALS BY COMMISSIONER NICHOLAS JOHNSON.

Commissioner Nicholas Johnson has dissented to the license renewals of North Carolina and South Carolina radio and television stations, taken in an FCC staff action of December 6, 1972. The dissent is attached.

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

Today the Federal Communications Commission again reveals that it is oblivious to the interests of the public. The majority refuses to question the fact that several of the stations owned by its licensees (this time in the North and South Carolina renewal group) propose news, public affairs, and other non-entertainment programming which fall woefully below the most meager of standards.

Four of this group's 297 AM radio stations and three of its television stations propose to program less than 5% news each week. Seven AM stations and one TV station (the same UHF station which refuses to program more than 1% news) proposed to broadcast less than 5% in the combined category of public affairs and other non-entertainment programming.

I am not certain where the majority gets this last category. Back in 1968 former Commissioner Kenneth Cox and I suggested that the FCC should have serious questions about whether broadcast stations are serving the public interest when they program less than 5% news, 1% public affairs, and 5% "other" non-entertainment programming. The majority disagreed; apparently, no station's programming decisions can raise public interest questions insofar as this majority is concerned.

Be that as it may, neither Commissioner Cox nor I ever referred to the "combined category of public affairs and other non-entertainment programming." Today, the Commission, in introducing that category, fails to make public the number of stations in this renewal

group which will fail to broadcast even 5% of non-entertainment programming other than news and public affairs.

I suppose, however, that a Commission which is not going to do anything about its licensees' stubborn refusals to serve the public interest, is also not going to be concerned with details.

I dissent.

F.C.C. 72-1035

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of NORTHEAST OKLAHOMA BROADCASTING, INC., VINITA, OKLA.	File No. BP-19163
P B L BROADCASTING CO., VINITA, OKLA. Request: 1470 kHz, 500 W, Day (Facilities of KVIN, Vinita, Okla.)	File No. BP-19233

MEMORANDUM OPINION AND ORDER

(Adopted November 17, 1972; Released November 21, 1972)

BY THE COMMISSION: COMMISSIONERS JOHNSON, REID AND WILEY ABSENT.

1. Before the Commission for consideration is a "Motion for Stay" of the Commission's Memorandum Opinion and Order in this proceeding denying Northeast's request for joint interim authority to operate the facilities of station KVIN pending the termination of the forthcoming comparative hearing between the applicants for regular authority. *Northeast Oklahoma Broadcasting, Inc.*, ——— FCC 2d ———, FCC 72-1019. PBL has filed a letter in opposition to the motion.[1]

2. Since April of 1972, Northeast has been operating the facilities of KVIN on a temporary basis following termination of a proceeding in which the Commission denied the former operator's application for renewal of license. *Vinita Broadcasting Company, Inc.*, 30 FCC 2d 458, 22 RR 2d 195 (1971), reconsideration denied, 32 FCC 2d 501, 23 RR 2d 262 (1971). Northeast's temporary ninety-day authorization was issued pursuant to section 309(f) of the Communications Act of 1934, as amended, and was extended for a second ninety-day period on July 19, 1972. Upon expiration of the statutory authorization, the Commission, with the consent of the competing applicant, granted Northeast a special temporary authorization (STA) for a period of thirty days, to permit Commission consideration of its proposal for joint interim operation. Since the aforementioned Memorandum Opinion and Order denying Northeast's request for interim authority did not extend the STA, it is scheduled to expire at midnight tonight.

3. Northeast requests a stay of the Commission's action until (i) it has filed a petition for reconsideration pursuant to section 405 of the Act and we have ruled on that petition, or (ii), in the alternative, until it has filed a notice of appeal and motion for stay in the U.S. Court of Appeals within ten days of any order denying the present motion and until the Court has resolved Northeast's appeal.

[1] Northeast's motion was filed November 16, 1972, and PBL's opposition on the following day.

4. In order to afford Northeast ample time to prepare and file its motion for stay with the Court of Appeals, we will stay the effectiveness of our previous action to the extent that it would result in termination of Northeast's broadcast activities as of November 17, provided that the motion for stay is filed within ten days of the release of this Order. This action will enable the Court of Appeals to rule on such motion for stay without being burdened by a rapidly approaching deadline.

5. We will not, however, stay that portion of our recent action which denied the request for interim authority. To stay the effectiveness of our denial pending dispositive action on any future petition for reconsideration and/or appeals would involve a considerable length of time and would thus tend to work at cross-purposes with our denial of the interim authority request.

6. In so ruling, we find it unnecessary at this juncture to discuss at length many of the substantive arguments raised by Northeast in its motion. These arguments bear directly on issues relevant to the Commission's denial of the interim authority request. Thus, it would appear more appropriate if the merits of these contentions were dealt with after Northeast has filed its petition for reconsideration or by the Court upon appeal. Nonetheless, we note that the denial of Northeast's request for interim authority was ordered with some reluctance. In order to continue service to Vinita and its environs, the Commission earlier this year moved swiftly under section 309(f) to authorize Northeast to operate the station. Once interest in an interim authorization was expressed, members of the Commission's staff consulted with the parties on numerous occasions and attempted to work out an arrangement which would be consistent with Commission policy. Unfortunately, as noted in paragraph 4 of our previous Order, the applicants reached an impasse in the negotiations. This was occasioned by PBL's refusal to agree to reimburse Northeast for one-half of its capital investment in the station's equipment.[2] While at first blush this refusal might not seem so, we believe that it was reasonable under the circumstances. The Commission has never compelled an applicant to buy equipment or land which it did not find would be suitable for future operation once permanent authority was granted. PBL has informed us that it declined to buy the equipment from the former licensee because it was in such poor condition. Thus, when Northeast purchased the equipment it did so at its own risk and it should have known that its ownership of the equipment would not compel the Commission to grant it interim operating authority. In order to preserve an existing broadcast service, the Commission maintains a policy of encouraging joint interim operation whenever possible and this case is certainly no exception. The reasons favoring joint operations rather than operation by a single competing applicant are manifest and need not be discussed here. This policy would be easily frustrated, however, if the Commission allowed a party to purchase the physical facilities of a defunct station secure in the knowledge that it could then exact capital contribution from other applicants wishing to participate in a

[2] Although we did not allude to it in our previous Order, the present general manager of KVIN operated the station under direction of the former licensee and PBL would not consent to his management of the proposed joint interim operation.

joint interim operation. This result, or any ruling which might encourage such a result, we cannot permit.

7. Finally, we must stress the fact that we are not unmindful of the plight of the residents of Vinita.[3] It was for this reason that the Commission, in paragraph 5 of our aforementioned Order, left the door open, stating that we "will entertain a further request for interim operating authority if and when the competing applicants may be able to agree on the terms under which . . . [it] can be conducted." In this connection, we maintain, as did our staff during the course of discussions with counsel for the applicants, that the proper method of proceeding would involve the formation of a third entity by the applicants to operate the station, and the payment of a fair rental by that entity to Northeast. In this manner, the pitfalls inherent in the forced capital contribution noted above can be avoided.

8. In view of the foregoing, IT IS ORDERED, That if Northeast Oklahoma Broadcasting, Inc., notifies the Commission within two days of the release of this Order that it intends to seek a stay of the Commission's Memorandum Opinion and Order adopted November 15, 1972 (FCC 72–1019), from the United States Court of Appeals for the District of Columbia Circuit and seeks such a stay within ten days of the release of this Order, the Commission's aforementioned Memorandum Opinion and Order IS HEREBY STAYED, to the extent that it requires Northeast Oklahoma Broadcasting, Inc., to cease broadcasting as of November 17, 1972, until the day after the Court acts on the prospective motion for stay, and IS DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[3] The Commission's finding under section 309(f) was based on KVIN's being the only local broadcast outlet for Vinita. However, we note that Vinita receives service from at least a dozen or more aural broadcast stations licensed to cities within a sixty-mile radius. It also receives television service from Tulsa, Oklahoma.

F.C.C. 73-124

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of R. W. PAGE CORP., TRANSFEROR and J. W. WOODRUFF, JR., AND J. BARNETT WOODRUFF, TRANSFEREES For Transfer of Control of Columbus Broadcasting Co., Inc., Columbus, Ga. (WRBL-AM-FM-TV)	BTC-6943

JANUARY 31, 1973.

Mr. J. W. WOODRUFF, Jr.,
Post Office Box 270,
Columbus, Ga.

DEAR MR. WOODRUFF: This is with reference to the application for consent to the transfer of control of Columbus Broadcasting Company, Inc. (BTC-6943), licensee of Stations WRBL-AM-FM-TV, Columbus, Georgia from the R. W. Page Corporation to yourself (81.22%) and your brother, J. Barnett Woodruff (18.78%).

The "one-to-a-market" provisions, Sections 73.35, 73.240 and 73.636, generally proscribe the acquisition of broadcasting stations where such an acquisition will result in the common ownership or control of both aural and television facilities in the same market. You have requested a waiver of these rules to permit the acquisition of Stations WRBL-AM-FM-TV, Columbus, Georgia, and in the alternative, you have stated your willingness to accept a grant conditioned on a subsequent disposition of Stations WRBL-AM & FM within a reasonable time.

We note that at the present time you own 39.8% of Columbus Broadcasting Company, Inc. and J. Barnett Woodruff owns 9.2% and that this ownership has existed since 1953. In that year, Stations WRBL-AM & FM were assigned to Columbus and its was granted a construction permit to build WRBL-TV. Prior to that time Columbus was controlled by the Woodruff family. In fact the Woodruff family has been connected with Station WRBL since 1930, when J. W. Woodruff, Sr. purchased 50% of the licensee's stock and became President and Director of the licensee corporation. You have also had long time associations with the stations, serving as Executive Vice-President and Manager of WRBL-AM & FM from 1935 to 1953. In 1953 you became the WRBL-TV General Manager and President of the licensee corporation, positions which you still hold. Your qualifications, with respect to the subject stations, have been passed upon several times by the Commission (e.g. the 1938 transfer to J. W. Woodruff and yourself, the 1946 construction permit for Station WRBL-FM and major change application for Station WRBL in

1947). In 1953 we again passed upon your qualifications in regard to the WRBL–AM & FM transfer and the WRBL–TV construction permit applications.

We also note that in addition to its controlling interest in Stations WRBL–AM–FM–TV, the transferor owns the only two daily newspapers in Columbus—the morning *Ledger* and the evening *Enquirer*. Columbus has two other commercial television stations, one of which is UHF, five other AM and two FM radio stations. Approval of this application would separate ownership of Columbus' newspapers and broadcast facilities and would further Commission policy favoring diversity in mass media.

In view of the above described circumstances, we have determined that a waiver of the multiple ownership rules is warranted. Accordingly, we have this day waived the "one-to-a-market" provisions of our multiple ownership rules and granted your application for transfer of control of Columbus Broadcasting Company. While the Commission's 2% grant fee cannot be precisely determined at this time, it will be based on the following two factors: $2,244,003.64 plus the mean between the bid and asked price on the last business day before consummation of 2,480 shares of Tele-Communications, Inc.

Commissioner Johnson dissenting and Commissioner H. Rex Lee dissenting and issuing a statement.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

Dissenting Statement of Commissioner H. Rex Lee

I must dissent to the majority's action in approving the application for transfer of control of Columbus Broadcasting Company, Inc., licensee of Stations WRBL–AM–FM–TV, Columbus, Georgia. R. W. Page Corporation now owns 51% of the stock of Columbus Broadcasting,[1] and J. W. Woodruff, Jr. and J. Barnett Woodruff (his brother) own 39.8% and 9.2%, respectively. By the proposed transaction, Columbus Broadcasting will redeem the Page Corporation shares, which will have the effect of increasing J. W. Woodruff, Jr.'s interest in the corporate licensee to 81.22% and J. Barnett Woodruff's interest to 18.78%. The transferees request waiver of the Commission's multiple ownership rules, which proscribe any acquisition that results in the common ownership or control of both aural and television facilities in the same market. Alternatively, the transferees indicate their willingness to accept grant of their application conditioned on the subsequent disposition of Stations WRBL–AM and FM within a reasonable time.

The majority's rationale for waiver of the multiple ownership rules and unconditional grant of the transfer application is based on the following considerations: (1) the Woodruffs are already substantial stockholders in Columbus Broadcasting, and J. W. Woodruff, Jr. has served in various executive and managerial positions with the stations

[1] R. W. Page Corporation also owns the only two daily newspapers in Columbus—the morning *Ledger* and the evening *Enquirer.*

since 1935;[2] (2) the Woodruff family has had a long association with the Columbus stations;[3] (3) the qualifications of the transferees have been passed upon by the Commission in connection with various applications; (4) the proposed transfer will separate the common ownership of the two Columbus daily newspapers and the broadcast facilities; and (5) J. W. Woodruff, Jr. could have acquired positive control of the licensee through the acquisition of less than a 50% stock interest on the basis of an FCC Form 316 (Short Form) application to which the multiple ownership restrictions are inapplicable.[4]

I simply cannot agree with such an ill-considered action. As I previously indicated in my dissenting statement in the *Pacific Broadcasting Company* case, our multiple ownership rules do apply to applications for assignment of license and transfer of control of existing stations, and only involuntary or *pro forma* assignments and transfers (as defined in Sections 1.540(b) and 1.541(b) of the Rules) are exempted from the duopoly provisions of the multiple ownership rules. Since the transfer here is voluntary and the interest to be transferred is a controlling one, whereby the Woodruffs will gain total ownership of the licensee, our multiple ownership rules are applicable and would proscribe the Woodruffs' acquisition of control of the Columbus aural and television facilities. While it may be true that the Woodruffs have enjoyed substantial interests in the corporate licensee in the past and J. W. Woodruff, Jr. has occupied executive and managerial positions with the stations, the fact remains that the transfer will give them positive and complete control over the policies and programming of the Columbus stations. Therefore, it cannot be seriously argued that the goals of our expanded duopoly rules, *i.e.*, to promote competition and to increase the diversification of program and service viewpoints, are furthered by the concentration of control of the licensee in the hands of the Woodruffs. While the decision is not an easy one to make in light of the Woodruffs' existing interests in the licensee, their family's longstanding relationship with the stations, our prior assessment of the Woodruffs' qualifications and the proposed separation of newspaper and broadcast properties in Columbus, I do not believe that we should avoid our carefully-conceived plan to bring new competition and viewpoints to broadcasting.

Moreover, I am most concerned by the majority's apparent acquiescence in the position that since J. W. Woodruff, Jr. could have acquired positive control of the licensee through transfer of less than a 50% interest in Columbus Broadcasting and the filing of an FCC Form 316, the Commission need not be troubled by the multiple ownership ramifications of the proposed transfer. Contrary to the majority's approach, it seems clear to me that whenever a minority shareholder in a

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[2] J. W. Woodruff, Jr., is presently president of the licensee corporation and general manager of Station WRBL–TV—positions which he has held since 1953. Prior thereto, he served as executive vice-president and manager of Stations WRBL–AM and FM.

[3] J. W. Woodruff, Sr. originally purchased 50% of WRBL's stock and became president and director of the licensee corporation in 1930. The Woodruff family controlled WRBL–AM and FM until 1953 when, pursuant to an agreement involving the WRBL–TV construction permit, Columbus Broadcasting became the licensee of the three stations with Commission approval. The proposed transfer will return the Woodruff family to control of the licensee after about 20 years in a minority position.

[4] This consideration is implicit in the majority's rationale. It was specifically referred to as a basis for waiver of the multiple ownership rules and grant of a transfer application involving two Hawaii aural-television combinations in *Pacific Broadcasting Company, Inc.*, 37 FCC 2d 448 (1972). I dissented to that action as well.

corporate licensee seeks to acquire enough stock to give him affirmative or negative control, prior Commission approval should be obtained consistent with the mandate of Section 310(b) of the Communications Act. The basic issue to be addressed here is not whether Woodruff could have acquired positive control of the licensee without triggering our multiple ownership restrictions, but rather whether the proposed transfer of more than a 50% interest is consistent with our diversification policies. Our approach in such situations should be in favor of the broad application of our multiple ownership policies rather than the creation of an additional exemption that subverts the very purpose of our regulations.

Since I am unable to find sufficient public interest considerations which would outweigh the importance of our existing diversification policies,[5] I can only conclude that our multiple ownership rules prohibit this transfer, which would concentrate control of the Columbus AM–FM–TV combination in the hands of the Woodruffs. As a result, I would either deny the transfer application or approve a grant subject to the transferees' divestiture of either the aural or television facilities.

For these reasons, I respectfully dissent to an action that effectively ignores the diversification goals of our multiple ownership rules and encourages the evasion of statutory and administrative requirements relating to the transfer of control of broadcast licensees.

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[5] While the Commission has indicated its concern with the problem of newspaper-broadcast joint ownership and its effect on diversification goals, no rules have been adopted which would require separation of such interests. See *Further Notice of Proposed Rulemaking in Docket No. 18110*, 22 FCC 2d 339 (1970). In any event, the fact that approval of the proposed transfer will result in separation of newspaper-broadcast interests in Columbus is insufficient reason to waive our existing duopoly restrictions.

F.C.C. 73–120

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re	
PARSEN ELECTRIC CO., WYMORE, NEBR.	CAC–611 NE045
PARSEN ELECTRIC CO., BLUE SPRINGS, NEBR.	CAC–612
For Certificates of Compliance	NE046

MEMORANDUM OPINION AND ORDER

(Adopted January 31, 1973; Released February 8, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT; COMMISSIONER REID DISSENTING.

1. Mr. E. M. Parsen, doing business as Parsen Electric Co., has filed the above-captioned applications for Certificates of Compliance to begin cable television service at Wymore and Blue Springs, Nebraska, small communities located outside of all television markets. Mr. Parsen intends to carry the following television broadcast signals on these two systems:

KOLN–TV	(CBS)	Lincoln, Nebr.
KUON–TV	(Educ.)	Lincoln, Nebr.
KMTV	(NBC)	Omaha, Nebr.
KETV	(ABC)	Omaha, Nebr.
KHTL–TV	(ABC)	Superior, Nebr.

The signal of KHTL–TV will be carried pursuant to a request by Bi-States Company, licensee of KHTL–TV. However, the applicant does not wish to extend network program exclusivity protection to KHTL–TV, and Bi-States opposes certification until its station is assured both carriage and exclusivity protection.

2. Although KHTL–TV places a predicted Grade B contour over Wymore and Blue Springs, it is not significantly viewed in these communities. Mr. Parsen argues that the carriage of KHTL–TV and the extension of exclusivity protection to its network programming will not assist the "marketing of cable service", and may even be detrimental to its growth.

3. As stated above, both Wymore and Blue Springs are very small communities. In 1970, Wymore's recorded population was 1,790 while Blue Spring's was 615, and both figures represented small declines since 1960. Under the circumstances, we believe a temporary waiver of Section 76.91 is in order. In the *Cable Television Report and Order*, we specifically noted the retention of the policies and precedents which evolved under the former program exclusivity rule, Section 74.1103. Par. 98, *Cable Television Report and Order*, 36 FCC 2d 143, 181. One of these policies was to waive the immediate imposition of program

exclusivity by small systems which had yet to obtain 500 subscribers. See *Spencer Community Antenna System, Inc.*, 22 FCC 2d 57 (1970). We believe the public interest will be served if a similar temporary waiver is extended to the applicant's systems, until 500 subscribers are served by each system.

In view of the foregoing, the Commission finds that a grant of the subject applications would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the applications for Certificates of Compliance (CAC–611 and CAC–612) filed by the Parsen Electric Co., for Wymore and Blue Springs, Nebraska, ARE GRANTED and appropriate Certificates of Compliance will be issued.

IT IS FURTHER ORDERED, That the objection of Bi-States Company IS DENIED.

IT IS FURTHER ORDERED, That the Parsen Electric Co., IS DIRECTED to comply with the requirements of Section 76.91 of the Commission's Rules with respect to its cable television systems at Wymore and Blue Springs, Nebraska, seven (7) days after it obtains at least 500 subscribers for either system.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-140

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
AMENDMENT OF SECTION 0.485 AND APPENDIX 1 PART 97 OF THE COMMISSION'S RULES REGARDING RADIO OPERATOR EXAMINATION POINTS

ORDER

(Adopted February 7, 1973; Released February 12, 1973)

BY THE COMMISSION: COMMISSIONER H. REX LEE ABSENT.

1. The Commission has before it the desirability of amending Section 0.485 showing the location of the Field Engineering Bureau's examination points for amateur and commercial radio operator licenses.

2. Authority for the amendment is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended. Section 552 of the Administrative Procedure Act and Section 0.261(a) of the Commission's Rules. Because the amendment is procedural in nature, the prior notice and effective date provisions of Section 553 of the Administrative Procedure Act do not apply.

3. IT IS ORDERED, that effective February 21, 1973, Parts 0 and 97 of the Rules and Regulations are amended as set forth in the Appendix hereto.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

§ 0.485 [Amended]

The semi-annual examination points listed in 0.485(c) are amended by adding in the appropriate alphabetical order, the city of Helena, Montana, and the annual examination points are amended by deleting Great Falls, Montana and Helena, Montana.

Part 97—Appendix [Amended]

The semi-annual examination points listed in Appendix 1 are amended by adding in the appropriate alphabetical order the city of Helena, Montana. The annual examination points listed are amended by deleting the cities of Great Falls, Montana and Helena, Montana.

F.C.C. 73-123

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re	
REGIONAL CABLE CORP., D.B.A. GLEN ROCK CABLE CORP., GLEN ROCK, PA.	CAC-1038 PA09A
REGIONAL CABLE CORP., D.B.A. DILLSBURG CABLE TV CO., DILLSBURG, PA.	CAC-1208 PA58A
REGIONAL CABLE CORP., D.B.A. SPRING GROVE CABLE TV CO., SPRING GROVE, PA.	CAC-1244 PA1022
For Certificates of Compliance	

MEMORANDUM OPINION AND ORDER

(Adopted January 31, 1973; Released February 8, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING AND ISSUING A STATEMENT.

1. Regional Cable Corporation has filed applications for certificates of compliance to begin cable television service at Glen Rock, Dillsburg, and Spring Grove, Pennsylvania, small communities located within the Harrisburg-Lancaster-York, Pennsylvania television market (the 57th largest television market). Each cable system will be separately operated, although Regional intends to build uniform 27 channel capacity systems carrying the identical signals in every community. The signals of the following stations are proposed for carriage: WLYH-TV (CBS), WGAL-TV (NBC), Lancaster, Pennsylvania; WSBA-TV (CBS), York, Pennsylvania; WITF-TV (Educ.), Hershey, Pennsylvania; WHP-TV (CBS), WTPA (ABC), Harrisburg, Pennsylvania; WMPB (Educ.), WBAL-TV (NBC), WJZ-TV (ABC), WMAR-TV (CBS), Baltimore, Maryland; WTTG (Ind.), WDCA-TV (Ind.), Washington, D.C. These applications are unopposed, and the proposed signal carriage is consistent with Section 76.63 of our Rules.

2. The Commission's Rules require new cable systems intending to begin operations in the major television markets to have a capacity of twenty channels, two-way communications capability and separate channels for public, educational and local government access in each community. Regional requests a partial waiver of Section 76.251 of the Rules insofar as this Rule requires that it provide three separate access channels in each community. At the present time, the applicant contends that it has neither the personnel nor the financial ability to comply wholly with Section 76.251 of the Rules. Moreover, each community is a very small one, and it is most unlikely that sufficient demand will develop in each community for the provision of three separate access channels. Glen Rock's 1970 population was 1,590; Dillsburg's was 1,434; and Spring Grove's was 1,662. There are no more than 600 homes

in any community, and at best Regional can hope to obtain fewer than 400 subscribers for any one of its systems. As an alternative to full compliance, Regional urges that one common access channel per community should satisfy any immediate demand for access.

3. We have provided similar relief in *Stark County Communications, Inc.*, FCC 72–1189, — FCC 2d —— (1972). Small systems which happen to be located in major television markets will be spared the expense of full compliance with Section 76.251 of the Rules in appropriate situations. We believe that the small size of these particular communities justifies the partial waiver requested, and certification will be authorized; however, should sufficient demand for full access develop in these communities, then we expect Regional Cable Corporation to make additional access channels available.

In view of the foregoing, the Commission finds that a partial waiver of Section 76.251 of the Rules and grant of the above-captioned applications would be consistent with the public interest.

Accordingly, IT IS ORDERED, That Regional Cable Corporation IS GRANTED a partial waiver of Section 76.251 of the Rules to the extent indicated in paragraph 3 above.

IT IS FURTHER ORDERED, That the applications (CAC–1038, 1208, 1244) for certificate of compliance filed by Regional Cable Corporation for Glen Rock, Dillsburg and Spring Grove, Pennsylvania ARE GRANTED and appropriate certificates of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

DISSENTING STATEMENT OF COMMISSIONER NICHOLAS JOHNSON

I dissent to the grant of these certificates of compliance and to the majority's waiver of our public, educational and governmental access rules for the reasons set forth in my dissents to *Stark County Communications*, ——— FCC 2d ——— (1973), and *Saginaw Cable TV Co.* (decided this day).

F.C.C. 73-121

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re	
SAGINAW CABLE TV CO., SAGINAW, MICH.	CAC-580, CSR-198 MI145
SAGINAW CABLE TV CO., TOWNSHIP OF SAGINAW, MICH.	CAC-581, CSR-200 MI146
SAGINAW CABLE TV CO., ZILWAUKEE, MICH.	CAC-582, CSR-199 MI147
SAGINAW CABLE TV CO., TOWNSHIP OF CARROLLTON, MICH.	CAC-583, CSR-201 MI148
For Certificates of Compliance	

MEMORANDUM OPINION AND ORDER

(Adopted January 31, 1973; Released February 8, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING AND ISSUING A STATEMENT.

1. On June 6, 1972, Saginaw Cable TV Co. filed the above-captioned applications for four new twenty-six channel cable television systems to operate from a common head end and offer service to approximately 91,849 persons in Saginaw, Michigan (the 61st television market); approximately 27,234 persons in Township of Saginaw, Michigan; approximately 2,072 persons in Zilwaukee, Michigan; and approximately 8,526 persons in Township of Carrollton, Michigan. Saginaw Cable proposed to offer subscribers the television signals of WKNX-TV (CBS),[1] Saginaw, Michigan; WNEM-TV (NBC), Bay City, Michigan; WJRT-TV, Flint, Michigan; WJIM-TV (CBS), Lansing, Michigan; WUCM-TV (Educ.), Bay City, Michigan; WKBD-TV (Ind.), Detroit, Michigan; and CKLW-TV (Ind.), Windsor, Ontario. Public notice of these applications was given June 28, 1972. On July 31, 1972, Rust Craft Broadcasting Company, licensee of Station WEYI-TV, Saginaw, Michigan, filed an "Opposition to Applications for Certificates of Compliance and Petition for Special Relief" in which it requested special relief against Saginaw Cable's proposed carriage of WJIM-TV and CKLW-TV. Thereafter, on August 10, 1972, Rust Craft and Saginaw Cable entered into a private agreement whereby Saginaw Cable agreed to withdraw its proposal to carry WJIM-TV and Rust Craft agreed to withdraw its objections. Saginaw Cable amended its applications on September 12, 1972, to withdraw its request to carry WJIM-TV, and on September 29, 1972, Rust Craft withdrew its objections. Next, on October 12, 1972, Gross Telecasting, Inc., licensee of Station KJIM-TV, Lansing, Michigan, filed an "Opposition to Application for Certificates of Compliance, as Amended,"

[1] The call letters of this station were later changed to WEYI-TV.

directed against CAC–580, CAC–582, and CAC–583, and Saginaw Cable and Rust Craft have replied.

2. The issue presented by the pleadings is whether Gross is entitled to insist on carriage of WJIM–TV. WJIM–TV is not a station which Saginaw Cable could normally carry; however, by virtue of our decision in *Booth American Co.*, 13 FCC 2d 270 (1968), an argument can be made that carriage of WJIM–TV is grandfathered in Saginaw, Zilwaukee and Township of Carrollton (Gross does not claim that the *Booth* decision dealt with Township of Saginaw, and therefore has not opposed CAC–581). Whatever the likelihood that it might have prevailed on this claim [2], Saginaw Cable elected to give it up in order to settle the controversy with Rust Craft. Gross now objects on the rationale that grandfather rights should be extended to the station involved as well as to the cable television system, and that Rust Craft should not be allowed to benefit from its earlier objection. This argument is unsupported in citation to Commission precedent, and ignores the fact that Gross is itself apparently attempting to practice the same tactic. Under the circumstances, we think Saginaw Cable was entitled to enter into a private settlement with Rust Craft in order to resolve the uncertainties connected with its applications, and that Gross has no ground upon which it is entitled to object. Accordingly, Gross' opposition will be denied.

3. An additional matter requires mention. In its amendment of September 12, 1972, Saginaw Cable states that:

> "As described in its certification application, Saginaw Cable proposes at this time to provide one public access, one educational access and one local government access channel for its system serving Saginaw, Zilwaukee, Saginaw Township, and Carrollton Township. Each of these communities, which will be served by a single head end located in Saginaw, forms part of a single contiguous urbanized area of which Saginaw is the center culturally, economically, and geographically. The people living in these communities share common interests and concerns which can best be served by common access channels. Since Saginaw Cable cannot predict the extent of use of access channels at this time (there are only 2,072 people in Zilwaukee and 8,526 people in Carrollton Township according to the 1970 Census), it will make such additional channels available on a system-wide basis as are justified by the demand for public, educational, and local government access. In this way, the Commission's intention that access be available will be satisfied, and no initial user will be subjected to the problem of reception in the home being dependent upon a channel converter."

We understand this statement to indicate the rate at which Saginaw Cable intends to make access channels available (we note that it is proposing to install sufficient channel capacity to allow it to satisfy access requirements for all four systems), and have no objection to it. See also par. 90, *Reconsideration of Cable Television Report and Order*, FCC 72–530, 36 FCC 2d 326, 359. However, should sufficient demand develop, we expect Saginaw Cable to make additional access channels available.

In view of the foregoing, the Commission finds that a grant of the above-captioned applications would be consistent with the public interest.

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[2] Par. 49, *Reconsideration of Cable Television Report and Order*, FCC 72–530, 36 FCC 2d 326, 345, recognized that WKNX might have a "meritorious" claim, but left its settlement for special relief.

Accordingly, IT IS ORDERED, That the "Opposition to Applications for Certificates of Compliance and Petition for Special Relief" (CSR–198, CSR–199, CSR–200, CSR–201) filed July 31, 1972, by Rust Craft Broadcasting Company IS DISMISSED.

IT IS FURTHER ORDERED, That the "Opposition to Application for Certificates of Compliance, as Amended" filed October 12, 1972, by Gross Telecasting, Inc., IS DENIED.

IT IS FURTHER ORDERED, That the above-captioned applications (CAC–580, CAC–581, CAC–582, CAC–583) ARE GRANTED, and that appropriate certificates of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

Today the Federal Communications Commission illustrates its contempt not only for the public, but for its own process. The majority grants certificates of compliance to Saginaw Cable TV Co., proposed operator of four new cable systems in four neighboring Michigan communities—all in the 61st television market. I dissent because the access proposals submitted by these systems do not comport with our rules.

Saginaw proposes to provide cable service from a common head-end to citizens in Saginaw (approximately 92,000 persons), Saginaw Township (approximately 27,000), Zilwaukee (approximately 2,000 persons) and the Township of Carrollton (approximately 8,500 persons). Under our rules, despite the use of a common head-end, Saginaw Cable thus proposes four separate cable systems, § 76.5(a) *Cable Television Report and Order*, 36 FCC 2d 141, 214 (1972), and each system must, according to our rules, provide each community with three separate access channels—one for the public, one for education, and one for government. See § 76.251 *Cable Television Report and Order*, 36 FCC 2d at 240–242.

Alleging that the provision of such channels would impose an undue financial burden, and arguing that the four communities have indicated no demand for separate access facilities, Saginaw Cable proposes to provide only three access channels for all four communities combined. The majority simply accepts both Saginaw's allegations and its proposal despite the fact that the systems' 26 channel capacity could (insofar as the Commission has been made aware) easily accommodate the proposed carriage of six broadcast signals plus the full panoply of access channels envisioned by our rules, and despite the fact that Saginaw Cable has introduced absolutely no evidence as to its financial situation (e.g., ownership and income), the costs of complying with our access rules, or the four communities' demands for access.

The majority relies for this result, at least in part, upon *Stark County Communications*, ——— FCC 2d ——— (1973), where the Commission granted—over my dissent—a similar waiver of our access rules. I dissented in that case because, while I believe some relaxation of our access rules might be warranted in rare circumstances

where strict compliance would clearly preclude a cable system from providing any service to the public at all, the majority could not possibly have made the requisite findings to support a waiver in that case. But, even assuming, *arguendo*, that *Stark County* was rightly decided—and assuming, therefore, that the cable systems there involved could not have afforded to provide broadcast signal carriage to the public had our access rules been fully enforced—the instant case is surely distinguishable.

Here we have four cable systems, owned by one company, which, given the facts before us, could apparently supply each of these communities with its own access channels without expanding channel capacity. (Whether or not such expansion would have been necessary in *Stark County* was not clear, though the majority apparently assumed that it would have been necessary.) Further, the relaxation of our access rules was justified in *Stark County* at least in part on the grounds that, given the very small populations in the various communities, the public's demand for access was not substantial. While the majority had absolutely no way of knowing whether such an assumption was valid in *Stark County*, it is difficult even to contemplate such an assumption in the instant case. Where, in *Stark County*, the total population to be served by all the systems did not exceed 2,000 persons, in the instant case, Saginaw Cable proposes to serve communities whose total population is over 120,000.

The majority does not perceive—let alone discuss—these differences. This is an excellent example of how this Commission relies on a bad precedent to create a truly outrageous body of law.

As I have suggested in the past, see my dissent in *Stark County Communications*, *supra*, because our cable access rules demand little capital expenditure from the cable industry, they offer the public little more than the *potential* for free and open access to what could well become the most dominant method of communication in America. While the cable industry could and should do much more to ensure the development of this potential, such potential is, itself, significant in light of the fact that America's commercial broadcasters have consistently and stubbornly refused to allow citizens the free and unfettered opportunity to communicate their ideas to their countrymen.

While my colleagues have approved the broadcast industry's stubborn refusal to live up to the demands of the First Amendment, see *Business Executives Move for Vietnam Peace*, 25 FCC 2d 242 (1970), reversed, *Business Executives Move for Vietnam Peace v. FCC*, 450 F. 2d 642 (D.C. Cir. 1971), now pending decision in the Supreme Court, they have recognized, through promulgation of our cable access rules, that the cable industry—due to its virtually unlimited channel capacity—will have to meet a higher standard. Today's action is, however, yet another step backward—a step which greatly increases the public's burden in gaining access to cable television, and which thus undermines the public's Constitutional right to free and open debate.

I dissent.

F.C.C. 73R–63

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
SALEM BROADCASTING CO., INC., SALEM, N.H.	Docket No. 19434
	File No. BP–18325
NEW HAMPSHIRE BROADCASTING CORP., SALEM, N.H.	Docket No. 19435
	File No. BP–18479
SPACETOWN BROADCASTING CORP., DERRY, N.H.	Docket No. 19436
For Construction Permits	File No. BP–18492

MEMORANDUM OPINION AND ORDER

(Adopted February 5, 1973; Released February 8, 1973)

BY THE REVIEW BOARD.

1. When Salem Broadcasting Co., Inc., filed its application, it revealed that one of its principals was also an officer and stockholder in Natick Broadcast Associates, Inc., which was subsequently set for consolidated hearing with another application. Thereafter, when the instant case was designated for hearing, reference was made in the Order to the Natick case. Later, the case involving Natick was concluded and the issues which had been raised against the Salem principal were resolved in his favor. Salem did not report these changes or developments by amending its application, and Spacetown Broadcasting Corporation, in the petition now before the Board,[1] argues that this failure requires the specification of a Rule 1.65 issue against Salem. The petition will be denied. In the Board's judgment, it would be carrying the requirements of Section 1.65 to ridiculous extremes to hold that a hearing issue must be specified for failure to amend an application to reveal developments that were fully reported in decisions and opinions released by various branches of the Commission's adjudicatory operations, especially under the circumstances of this case where the designation Order made specific reference to the other proceeding, and no motive for concealment exists.

2. Accordingly, IT IS ORDERED, That the petition to enlarge issues, filed by Spacetown Broadcasting Corporation on December 18, 1972, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[1] The petition was filed December 18, 1972. The Broadcast Bureau filed its opposition on January 3, 1973; Salem Broadcasting filed its opposition on January 5, 1973; and Spacetown submitted its reply on January 17, 1973.

F.C.C. 73R-62

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON D.C. 20554

In Re Applications of	
SALEM BROADCASTING CO., INC.,	Docket No. 19434
SALEM, N.H.	File No. BP-18325
NEW HAMPSHIRE BROADCASTING CORP.,	Docket No. 19435
SALEM, N.H.	File No. BP-18479
SPACETOWN BROADCASTING CORP.,	Docket No. 19436
WEST DERRY, N.H.	File No. BP-18492
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted February 5, 1973; Released February 8, 1973)

BY THE REVIEW BOARD.

1. Based on reporting omissions by Spacetown Broadcasting Corporation concerning the ownership interests of one of its principles, Salem Broadcasting Co., Inc., seeks addition of a Rule 1.65 issue.[1] Two grounds are alleged. One relates to the fact that the interest of Mr. Gureckis, one of Spacetown's principals, in an application for a Station in Shenandoah, Iowa, was not reported until May 1, 1970, even though the interest existed at the time Spacetown's application was filed on June 2, 1969. However, the interest was voluntarily reported more than two years prior to the filing of the subject motion, and petitioner made no effort to justify or explain the long delay in bringing this omission to the Commission's attention; accordingly this basis for enlargement will be rejected. The other ground for adding to the issues is that Spacetown delayed until October 10, 1972, reporting that the Shenandoah applicant in which Mr. Gureckis has an interest received a construction permit on November 12, 1970. Assuming that this aspect of the petition was brought to the Commission's attention in a timely fashion, the Board is of the view that this omission was not a significant one and does not support addition of an issue.

2. Accordingly, IT IS ORDERED, That the motion to enlarge issues, filed on October 25, 1972, by Salem Broadcasting Co., Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[1] The motion to enlarge was filed October 25, 1972. The Broadcast Bureau's comments and Spacetown's opposition were filed November 8, 1972.

109-027—73——9

F.C.C. 72-1154

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re request by
SCRIPPS-HOWARD BROADCASTING CO., STATION WPTV, WEST PALM BEACH, FLA.
For Interpretive Ruling Re Section 76.59 (d) (2) of Commission Rules

DECEMBER 15, 1972.

HARRY J. OCKERSHAUSEN, ESQ.
Dempsey and Koplovitz,
938 Bowen Building,
Washington, D.C.

DEAR MR. OCKERSHAUSEN: This is in reply to your letter of December 12, 1972, written on behalf of Scripps-Howard Broadcasting Company, licensee of television broadcast station WPTV, West Palm Beach, Florida. You have asked the Commission to issue an interpretative ruling that Section 76.59(d)(2) of the Commission's Rules does not authorize a cable television system to carry a network sports program of a distant network station when that program is blacked out on the network station normally carried by the system. You state that a prompt ruling is necessary because station WPTV, an NBC affiliate, being within 75 miles of Miami, will be blacked out for the December 16, 1972, Baltimore Colts-Miami Dolphins football game. Additionally, it is your understanding that WPTV will be blacked out on December 24, 1972, for the first game of the American Football Conference playoff, scheduled to be played in Miami. You state, further, that you have been informed that cable television systems in the West Palm Beach market intend to carry the December 16 Colts-Dolphins game and the December 24 playoff game by picking up the signal of a distant NBC affiliate not normally carried on the systems on the theory that Section 76.59(d)(2) authorizes such carriage. WPTV is a station normally carried on the cable systems.

Section 76.59(d)(2) authorizes cable carriage of any television station broadcasting a network program that will not be carried by a station normally carried on the system. Such carriage is authorized only for the duration of the network program not otherwise available, and prior Commission notification or certification is not required. In paragraph 19 of the *Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326, 333 (1972), the Commission stated that in line with its policy of assuring the availability of all network service to all cable subscribers:

> . . . it appears appropriate to permit carriage of those programs *offered by the network but not cleared by local affiliates.* (footnote omitted, emphasis added)

Thus, Section 76.59(d)(2) was adopted to provide cable subscribers with programming made available to the local affiliate by the network, but where, for reasons of its own, the affiliate chooses not to air such programming.

In the case of sports blackouts, the network, pursuant to contractual agreements with the particular sports league, has not made the programming available to the affiliate, and, in turn, it is not within the affiliate's discretion whether to air the program. In short, the programming is neither offered by the network nor can it be cleared by the affiliate. Accordingly, the importation of a distant network television station not normally carried on the system, which is broadcasting a professional sports program that is being blacked out pursuant to league-network contract on network stations normally carried on the cable system, is not authorized by Section 76.59(d)(2).

We trust that the foregoing adequately supplies the information sought in your letter of December 12, 1972.

Commissioner Johnson dissenting; Commissioners H. Rex Lee and Hooks absent.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
JAMES L. HARRISON, JACKSONVILLE, FLA.
Concerning Section 315, Equal Opportunities Re Station WJXT(TV)

FEBRUARY 2, 1973.

Mr. JAMES L. HARRISON,
c/o MacLean and Brooke,
Post Office Drawer X,
Jacksonville, Fla.

DEAR MR. HARRISON: This refers to your complaint dated October 13, 1972, against WJXT(TV), Jacksonville, Florida. You state that you were a legally qualified candidate in the Democratic Primary (held September 12, 1972) for the office of State Attorney, Fourth Judicial Circuit; that you had intended to broadcast political spot announcements on station WJXT; that your advertising campaign was to be handled by Mr. Robert N. Dow, Jr., who was preparing these announcements; that WJXT notified Mr. Dow by letter dated July 28, 1972, that time for spot announcements had not been allotted for the State Attorney's race although free time would be made available to you and your opponent on the "At Issue" show; that on August 2, 1972, Mr. Dow called Mr. Harry Kalkines, the station's sales manager, concerning WJXT's decision not to sell spot announcements to the State Attorney candidates, but was told by Mr. Kalkines that as far as he knew the decision was final; that on September 10, 1972, two days before the primary election, Mrs. Harrison observed a political spot announcement on WJXT by Mr. Don Nichols, your opponent in the primary; that the following day, September 11, Mr. Dow called the station and was informed by Mr. Kalkines that the station's earlier decision not to sell spot announcements to the State Attorney candidates was an oversight and that spots had been made available upon request; and that Mr. Kalkines apologized for the mixup and indicated he would have sold spots to you if there had been a request, but in checking the log found no such request had been made by Mr. Dow on your behalf. You state that this action had an effect on your attempt to get elected, and seek a Commission ruling on the actions taken by the station.[1]

In response to a Commission inquiry, in a letter dated October 5, 1972, the station's Vice-President and General Manager, Mr. Robert W. Schellenberg, states that the July 28, 1972 letter "inadvertently omitted" the State Attorney candidates from the list of those races which

[1] In response to oral inquiry, counsel for Mr. Harrison stated that Mr. Dow did not on September 11 attempt to buy time for Mr. Harrison because the station's policy was to refuse to sell time to candidates on the day before the election. Counsel for WJXT agreed that the station had a policy of not selling time to political candidates on the day before the election, and that no time was offered to Mr. Harrison on September 11.

would be sold spot announcements. Mr. Harry Kalkines states the following in regard to the content and communications surrounding the July 28 letter:

> Shortly after July 28, I was called by Mr. Robert Dow, a partner in the local advertising agency of Hubbard, Duckett, Mason, Dow, Inc. I do not recall Mr. Dow's asking about the purchase of time for candidates for State Attorney, Circuit 4. However, he may have and, if he did, I would have relied on Mr. Mosby's July 28 letter which set forth the amount of time available with respect to each office, but did not name State Attorney. I am sure that Mr. Dow did not state that he represented any particular candidate with regard to the State Attorney race or any other race. Indeed, if he had done so, I would have made a record of the inquiry on the station's form for requests for political time, because this is station policy and my invariable practice with respect to requests for political time. It is not unusual for an advertising representative to ask about political availabilities before he formally represents a candidate or without stating whom he represents.
>
> Early in the week of August 7, I asked Mr. Mosby, who had been on vacation from July 29 through August 6, why the station did not sell time to candidates for State Attorney, Circuit 4. I pointed out that Attachment B to Mr. Mosby's July 28 letter to the candidates indicated that free time would be offered to candidates for State Attorney; but Attachment A, which listed the amount of time that would be made available for sale to candidates for each office, did not refer to State Attorney. Mr. Mosby stated that the omission of State Attorney from Attachment A was an oversight. We discussed which category in Attachment A State Attorney should be included in and decided that it should be included in Group III. At the time of my conversation with Mr. Mosby, I did not have in mind any earlier conversation with Mr. Dow, although it is not unlikely that the omission of State Attorney from Attachment A had been called to my attention by Mr. Dow and that this resulted in my bringing it up with Mr. Mosby when Mr. Mosby returned from vacation. In any event, if Mr. Dow had stated that he was making a request on behalf of a candidate, I would have had a record of the request and would have called him after my conversation with Mr. Mosby to offer to sell time to the candidate represented by Mr. Dow.

The licensee further states that Mr. Nichols was sold time pursuant to a specific August 15 request on his behalf; and that the station has no record of a specific request by you or your advertising agent, Mr. Dow. In addition, the licensee submitted an affidavit by Mr. Jan Fisher in which he states that on August 10, after the taping of the "At Issue" show, you questioned him about WJXT's July 28 decision not to sell spot announcements and that he told you that he "was unaware that there was such a policy and suggested you call the station" management; and that you indicated at that time you would call the station manager to clarify the matter. The licensee states that to its knowledge no call was received; however, it also states that it should have notified both candidates of the change in policy, but states that it is the individual candidate's obligation to make requests and monitor the station for Section 315 violations.

In reply to the station's response, affidavits were submitted by Mr. Dow and you which you state controvert the affidavits submitted by Messrs. Kalkines and Mosby of Station WJXT. Mr. Dow states:

> On the morning of August 2, 1972, I talked by phone to Mr. Jim Harrison, who at that time had a copy of the WJXT, Channel 4 written statement dated July 28, 1972 in front of him, and we discussed the omission of the State Attorney's race. As a result of this conversation, I was requested by him to check with the station to verify the omission. As set forth in the final paragraph of the July 28, 1972 written statement that all contact was to be made with Harry Kalkines, the station's sales manager, I called Mr. Kalkines, whom I have known for some 15 years. After identifying myself, I said that the agency was handling Jim

Harrison in the State Attorney's race and I noted that the State Attorney's race was not allocated time for purchase on Attachment A of the July 28, 1972 letter. Mr. Kalkines' answer was that because the State Attorney's race was not listed on Attachment A, there were no spots available for that race. I asked why the decision was made to exclude the race and Mr. Kalkines replied that he didn't know why the decision was made, he just worked there and if the race was not listed on Attachment A there were no spots available.

In summary, the licensee and the complainant agree that in its original letter to the two candidates for State Attorney the licensee indicated that no time would be sold to either candidate; Mr. Dow states that during a telephone conversation with him on August 2, Mr. Kalkines verified this refusal to sell time; Mr. Kalkines states that he does not recall Mr. Dow's asking about purchase of time for State Attorney candidates, "although it is not unlikely" that Mr. Dow did ask, and that if he did, Mr. Kalkines would have confirmed the written announcement that such time would not be sold; Mr. Dow states that during this conversation he informed Mr. Kalkines, in connection with the inquiry about availability of time, that Mr. Dow's advertising agency was representing Mr. Harrison in the race; Mr. Kalkines states that if Mr. Dow had done so, Mr. Kalkines would have made a record of a request for political time on the appropriate station form; licensee states that after Mr. Kalkines brought to its attention the omission of State Attorney candidates from its list of those eligible to buy time it was determined that such time should be sold, because the omission was an oversight; later, Candidate Nichols, opponent of Mr. Harrison, asked to buy time on WJXT and was sold time but WJXT did not notify Mr. Dow or Mr. Harrison of this fact or the fact that time was now being sold to State Attorney candidates; on the basis of the station's original written announcement and (according to Mr. Dow) on the basis of his conversation of August 2 with Mr. Kalkines, no attempt was made by Mr. Harrison to buy time; Mr. Harrison learned on Sunday, September 10, that Mr. Nichols was buying time on WJXT; Mr. Dow made inquiry of the station the next day and learned for the first time that the originally stated policy had not been followed; however, since the station does not sell time to candidates on the day preceding election day (in this case the election was on September 12), Mr. Harrison did not ask to buy time on the one remaining day, September 11, the licensee provided free time to both candidates on its "At Issue" program broadcast on August 12; according to an affidavit by Mr. Jan Fisher, WJXT newsman, he suggested to Mr. Harrison during a discussion after the taping of this program on August 10 that he call the station manager about the refusal to sell time to State Attorney candidates, but the licensee states that Mr. Harrison did not do so.

The licensee acknowledges that it should have notified both candidates of the change in its previously announced policy. It is obvious that the licensee should have done so, particularly after selling time to one candidate, since such sale without notice to the other candidate that the licensee's stated policy had changed left him in a disadvantageous position, and constituted a violation of Section 73.657(a)(2) of the Commission's Rules, which prohibits discriminating between candidates "in charges, practices, regulations, facilities or services," or the making or giving of "any preference to any candidate

for public office," or subjecting "any such candidate to any prejudice or disadvantage."

There is no evidence, however, that the licensee intentionally discriminated against Mr. Harrison and in the absence of such evidence, further Commission action does not appear warranted. However, the Commission expects the licensee hereafter to exercise special diligence to assure that its policies regarding availability of time are clearly stated to all candidates and to assure that any change in announced policies is promptly communicated to all affected candidates, in order to prevent future discrimination.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY,
Chief, Complaints and Compliance Division
for Chief, Broadcast Bureau.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
ROBERT E. O'DONNELL, BROOKLYN, N.Y.
Concerning Section 315, Political Broadcast and Fairness Doctrine Re Stations
WCBS, WPIX, and WABC

FEBRUARY 5, 1973.

MR. ROBERT E. O'DONNELL,
1769 East 31st Street,
Brooklyn, N.Y.

DEAR MR. O'DONNELL: This refers to your complaint against three New York television stations—WCBS, WPIX and WABC—alleging that as a qualified, bona fide candidate for the Democratic nomination, you were denied news coverage during the primary campaign for a seat in New York's 16th Congressional District. You request that the Commission "investigate the methods of news coverage during the primary campaign, the so-called 'contacts' of newsmen which pre-determine which candidate will be covered, the relationships of news facts vs. opinions and how the latter is passed to viewers as the former, and the right of TV stations to omit candidates at will from news programs in violation of the F.C.C. Fairness Doctrine."

You contend (a) that WCBS–TV on Wednesday, June 14 on the 6:00 p.m. news report broadcast filmed segments of the two other candidates, Congressman Emanuel Celler and Ms. Elizabeth Holtzman; that after a complaint by you, WCBS–TV broadcast, on the 11:00 p.m. news report of the same date, a statement of your candidacy; that on Thursday, June 15, you were informed that no further mention of your campaign was going to be made by the station; (b) that WPIX–TV on Tuesday, June 13 on the 10:00 p.m. news broadcast filmed interviews with Mr. Celler and Ms. Holtzman; that after a complaint was made about this, your candidacy was reported on Wednesday, June 14 on the 10:00 p.m. news; that on Sunday, June 18, at 10:30 p.m. on a 30-minute primary special, pictures of Mr. Celler and Ms. Holtzman were aired, along with a map showing that they were the Democratic candidates in the 16th Congressional District race; and (c) that WABC–TV on Tuesday, June 20 on the 6:00 p.m. news presented a rundown of candidates in each congressional district, and, for the 16th Congressional District, your name was omitted.

As you may know, the selection and presentation of specific program material are responsibilities of the station licensee, and under the provisions of Section 326 of the Communications Act the Commission is specifically prohibited from censoring broadcast material. In keeping with the longstanding principle of licensee programming, responsibility and discretion, with regard to your request that the Commission investigate the stations' news coverage, the Commission will not substi-

tute its news judgment for that of a broadcaster, absent extrinsic evidence of deliberate distortion. *Democratic National Convention Television Coverage*, 16 FCC 2d 650 (1969); *Columbia Broadcasting System* ("Hunger in America"), 20 FCC 2d 143 (1969); *Letter to Mrs. J. R. Paul*, 26 FCC 2d 591 (1969). Such extrinsic evidence has not been furnished here. As to your allegation that opinions are presented to viewers as facts, neither the Communications Act nor the Commission's Rules require the separation of interpretive comment from news. The individual broadcast licensee is not required to label programs which interpret the news or contain expressions of opinion. Legislation designed to require broadcasters to identify the nature and source of and responsibility for editorial and interpretive comments has been considered by both Houses of Congress in the past, but none has been enacted.

The fairness doctrine, to which you refer, provides that where a licensee presents a discussion of one side of a controversial issue of public importance, an obligation arises to afford reasonable opportunities for the presentation of opposing views. Under the fairness doctrine, the licensee must make a good faith judgment as to what the needs and interests of his particular community call for with respect to the presentation of a particular controversial issue, the sides to be presented, the format to be used and the particular persons to present contrasting views.

It appears that the controversial issue of public importance involved here was who should be elected the Democratic nominee for a seat in New York's 16th Congressional District. Although you allege that you have not been provided with as much coverage as the two other candidates, you have cited only one or two news programs on WCBS–TV and WPIX–TV in which your opponents were discussed. You also cite the instances when your candidacy was reported by WCBS–TV (Wednesday, June 14, on the 11 p.m. report) and by WPIX–TV (Wednesday, June 14, on the 10:00 p.m. news). Under these limited circumstances, it does not appear that the Commission has a basis for concluding that either licensee has failed to comply with the fairness doctrine.

As to WABC–TV, you refer to only one program concerning the primary elections, the one in which you state that your name was left off a chart displaying the various candidates running in each district. You have furnished no other information concerning WABC–TV's coverage of your campaign at other times. From your description of that one program,[1] it does not appear that there was any discussion of the merits of the 16th District Congressional race, but merely a listing of the candidates, and therefore no fairness doctrine obligation would attach to such a brief presentation. Moreover, as indicated above, the Commission does not review licensee's news presentations. Accordingly, no Commission action appears warranted at this time.

[1] You state:

On the evening of June 20, 1972 (Tuesday), WABC–TV, Channel 7, New York, provided as part of its highly rated news program "EYEWITNESS NEWS" a rundown of the candidates and districts in the various primary contests in New York City. The information was prepared on a large printed chart and read simultaneously by newsman Robert Lape. The information about the contest in the 16th Congressional District, Brooklyn, read "EMANUAL CELLER VS. ELIZABETH HOLTZMAN." *NO* mention was made of Robert O'Donnell. His name was *not* included on the printed chart.

We regret that we are just now able to respond to your letter, but the staff was for many months swamped with complaints and inquiries related to the 1972 primaries, conventions and general elections, which would have become moot unless they were resolved at once. Therefore, it was necessary to postpone consideration of your complaint, which involved post-election matters, that normally we would have dealt with much earlier.

Enclosed for your further information are copies of the Commission's Public Notice of July 1, 1964, entitled "Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance," and Public Notices of August 7, 1970 and March 16, 1972, entitled "Use of Broadcast Facilities by Candidates for Public Office."

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division
for Chief, Broadcast Bureau.

F.C.C. 73-4

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re
RECEIVER CERTIFICATION RESCINDED FOR NONPAYMENT OF GRANT FEE

JANUARY 5, 1973.

THE COMMISSION BY COMMISSIONERS BURCH (CHAIRMAN), ROBERT E. LEE, JOHNSON, H. REX LEE, REID, WILEY AND HOOKS, ISSUED THE FOLLOWING PUBLIC NOTICE.

RECEIVER CERTIFICATION RESCINDED FOR NONPAYMENT OF GRANT FEE

On April 11, 1972, the Commission granted certification to Sona Labs, Inc., 369 St. Marks Ave., Brooklyn, N.Y. 11328 for a land mobile communications receiver Model No. RAS 10 operating in the 152–174 MHz band, described in the application for certification as "FM Scanner Monitor receiver". The application for certification was signed by Herman R. Campbell who indicated he was President of Sona Labs, Inc.

Section 1.1120 of the Commission's rules, 47 CFR Section 1.1120, requires a grant fee, in the amount of $25.00, for certification of equipment of the kind for which certification was granted to Sona Labs, Model RAS 10.

Section 1.1102 of the Commission's rules, 47 CFR Section 1.1102, provides that where a grant fee is prescribed, the fee is payable within 45 days after the date of the grant. That section further provides:

> All grants, approvals, and authorizations issued by the Commission are made subject to payment and receipt of the applicable fee within the required period. Failure to make payment of the applicable fee to the Commission by the required date shall result in the grant, authorization or approval becoming null and void and ineffective after that date.

Sona Labs, Inc., has not paid the grant fee required by Sections 1.1102 and 1.1120.

Attempts by the Commission to contact the applicant, Sona Labs, Inc., have proven unsuccessful. The applicant is no longer located at the address and telephone number given in the application, nor was any forwarding address or telephone number provided. We have also unsuccessfully attempted to contact Mr. Herman Campbell. In addition the Commission has been informed that Sona Labs, Inc., has filed bankruptcy proceedings, but we have been unable to determine if this is in fact true and if so in what court such proceedings have been initiated.

For the foregoing reasons, the Commission hereby gives notice that the certification granted to Sona Labs, Inc., on April 11, 1972, for its Model RAS 10 land mobile communications receiver is rescinded. Marketing of this equipment without certification will be in violation of Section 2.803 of the Commission's rules, 47 CFR Section 2.803.

F.C.C. 73R–68

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of ST. CROSS BROADCASTING, INC., SANTA CRUZ, CALIF.	Docket No. 19503 File No. BP–18014
JAMES B. FENTON, GRANT R. WRATHALL, JR., LAWRENCE M. WRATHALL AND LORETTA WRATHALL, D.B.A. PROGRESSIVE BROADCASTING CO., APTOS-CAPITOLA, CALIF.	Docket No. 19506 File No. BP–18221
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted February 7, 1973; Released February 12, 1973)

By THE REVIEW BOARD.

1. Before the Review Board is an appeal pursuant to Section 1.301 (a) (4) of the Rules,[1] filed January 9, 1973, by the Broadcast Bureau.[2] In his Memorandum Opinion and Order, FCC 72M–1595, released January 2, 1973, the Administrative Law Judge granted a joint petition and approved an agreement between the above-captioned applicants, including provisions in that agreement for reimbursement to St. Cross Broadcasting, Inc. (the dismissed applicant) of amounts expended in the prosecution of its application. The Broadcast Bureau, in its appeal argues that since a petition to enlarge issues pending before the Review Board alleges, *inter alia*, that St. Cross has misrepresented facts to the Commission,[3] the Presiding Judge could not properly grant the joint request absent a condition that reimbursement would be allowed only if (a) the Board denies the petition or (b) St. Cross establishes that it has not made misrepresentations to the Commission, if the Board adds the issue.

2. The Review Board will grant the Broadcast Bureau's appeal. Clearly, when a character issue is outstanding against an applicant, reimbursement of that applicant will not be allowed until there is a satisfactory resolution of that issue. See, *e.g.*, *Berwick Broadcasting Corp.*, 14 FCC 2d 132, 13 RR 2d 1073 (1968). Equally clear is the corollary that an applicant cannot avoid the effects of an adverse resolution of a character issue by agreeing to dismissal of its application between the times a petition to add a character issue is filed and action on that petition. Although dismissal of applications pursuant to joint agreements has been allowed where reimbursement is held in abeyance pending resolution of an outstanding character question,

[1] Rule 1.301(a)(4) provides that rulings granting a joint request filed under Section 1.525 without terminating the proceeding are appealable by any party as a matter of right.
[2] No pleadings have been filed in response to the Bureau's appeal.
[3] In the motion to enlarge issues, filed August 2, 1972, Progressive Broadcasting Company alleges that St. Cross has submitted false financial statements of its principals.

the subject agreement does not provide for dismissal without compensation and therefore the agreement cannot be approved.

3. Accordingly, IT IS ORDERED, That the appeal from Presiding Judge's Order, filed January 9, 1973, by the Broadcast Bureau, IS GRANTED; that the Order of the Administrative Law Judge granting joint request for approval of agreement, FCC 72M–1595, released January 2, 1973, IS SET ASIDE; and that the joint request for dismissal of application and approval for partial reimbursement of expenses, filed by the applicants on December 5, 1972, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73R–73

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of ST. CROSS BROADCASTING, INC., SANTA CRUZ, CALIF.	Docket No. 19503 File No. BP–18014
JAMES B. FENTON, GRANT R. WRATHALL, JR., LAWRENCE M. WRATHALL AND LORETTA WRATHALL, D.B.A. PROGRESSIVE BROADCASTING CO., APTOS-CAPITOLA, CALIF.	Docket No. 19506 File No. BP–18221
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted February 7, 1973; Released February 12, 1973)

BY THE REVIEW BOARD: BOARD MEMBER KESSLER CONCURRING IN RESULT

1. Before the Review Board for consideration is a motion to enlarge issues, filed August 2, 1972, by Progressive Broadcasting Company (Progressive), seeking the addition of financial, misrepresentation and Rule 1.65 issues against St. Cross Broadcasting, Inc. (St. Cross).[1] [2]

2. The pertinent facts, as alleged by the petitioner, are not in dispute. On December 20, 1971, St. Cross filed an amendment to its application, which had been filed in 1967, containing statements of loan commitments by principals and financial statements of those principals. William A. Anderson, 63% owner of St. Cross, pledged a total of $72,245 to St. Cross.[3] His financial statement claimed a net worth of $1,637,641 and total assets of $1,643,841, of which $1,204,395, or approximately 75% is listed as stock, notes and interest due on notes of Telfon Communications Corporation (Telfon). E. Kersh Walters, Jr., 15.5% owner of St. Cross, pledged a total of $10,124. His financial statement claims a net worth of $292,259 and total assets of $295,159, of which $209,159, or 70%, is listed as being in Telfon. Gerald E. Berman, 9% owner of St. Cross, pledged $6,749. His financial statement claims a net worth of $178,733 and total assets of $183,733, of which $94,733, or 50%, is listed as being in Telfon. St. Cross states in

[1] Also before the Board are: (a) Broadcast Bureau's comments, filed August 24, 1972; (b) opposition, filed August 24, 1972, by St. Cross; (c) reply, filed August 30, 1972, by Progressive; (d) motion for leave to file pleading and reply to (a), filed September 12, 1972, by St. Cross; (e) motion to strike unauthorized pleading, filed September 18, 1972, by the Broadcast Bureau; (f) opposition to (d), filed September 22, 1972, by Progressive; and (g) reply to (f), filed October 5, 1972, by St. Cross. St. Cross' motion for leave to file pleadings will be denied. The information in its supplementary pleading was available to St. Cross at the time it filed its opposition, and St. Cross has not demonstrated good cause for its untimely submission.

[2] Progressive's motion to enlarge is admittedly untimely. While its claim for good cause is tenuous, we find that the public interest questions raised in its petition are substantial and will consider the motion on its merits. See *The Edgefield-Saluda Radio Co. (WJES)*, 5 FCC 2d 148, 8 RR 2d 611 (1966).

[3] The pledged amounts stated are the sums of both pre-incorporation subscriptions of stock and loan commitments.

its pleadings that on December 10, 1971, Telfon determined to file a petition for an arrangement under Chapter Eleven of the Bankruptcy Act and that on January 24, 1972, Telfon's application to sell its operating assets was granted by the Referee in Bankruptcy and Telfon was adjudicated bankrupt. The bankruptcy proceeding was not reported to the Commission. On May 17, 1972, the Commission adopted the designation Order in these proceedings (FCC 72–422, 37 FR 10611, published May 25, 1972), finding St. Cross financially qualified and denying a petition, filed June 18, 1969, by Monterey Peninsula Broadcasters, Inc., to specify a financial qualifications issue against St. Cross. Finally, on September 5, 1972, St. Cross filed an amendment deleting reference to Telfon in the financial statements of the St. Cross principals.

3. Progressive contends that the above facts establish that Anderson and Walters were committed to loan the prospective licensee money to operate, knew of information relating to substantial changes which had occurred in their financial situations, and did not inform the Commission of those changes. Alleging that Question 10(f) of Section II of the Commission's application form specifically requires that such information be given the Commission,[4] movant claims that St. Cross has violated Section 1.65 of the Rules.[5] Progressive maintains that, despite the existence of other assets which may enable Anderson and Walters to meet their commitments, a question is nevertheless raised as to the character qualifications of St. Cross because of its apparent misrepresentations to the Commission. The Broadcast Bureau agrees with Progressive that the Commission's application form requires St. Cross to notify the Commission when a corporation controlled by one of St. Cross' principals (the Bureau alleges that Anderson owns 70% of Telfon) files a petition for an arrangement under the Bankruptcy Act. In the absence of such an amendment, the Bureau urges, substantial questions regarding St. Cross' candor with the Commission and compliance with the requirements of Rule 1.65 are raised. The Bureau does not support addition of a financial issue against St. Cross, since the balance sheets of Anderson and Walters do apparently reflect enough other assets to meet their commitments. The Bureau suggests, however, that the applicant submit current audited financial statements for both Anderson and Walters.

4. In opposition, St. Cross alleges that the balance sheets of Anderson and Walters reflect that each has sufficient current liquid assets above current liabilities to meet his commitment to St. Cross. Since neither of those principals relied on Telfon stock to meet his commitment, St. Cross claims, failure of that corporation is not of substantial importance. Moreover, St. Cross contends, since Telfon was neither an applicant nor a party to the application, such information was not required to be reported by FCC Form 301. In reply, Progressive main-

[4] FCC Form 301, Section II, Question 10(f) states: "Have voluntary proceedings in bankruptcy been instituted by, or have involuntary proceedings in bankruptcy ever been brought against applicant or any party to this application.

[5] Section 1.65 requires that an applicant amend its application whenever the information contained therein is no longer substantially accurate and complete, and to notify the Commission whenever there has been a substantial change as to any other matter which may be of decisional significance. The applicant should do so as promptly as possible and in any event within 30 days, unless good cause is shown.

tains that whether the financial qualifications of St. Cross were affected by the bankruptcy of Telfon is "irrelevant to a violation of Section 1.65," which only requires that substantial changes in information on file with the Commission be reported within 30 days. Progressive also agrees with the Broadcast Bureau that complete reporting of the financial status of parties to an application must include information with respect to other corporations controlled by those parties.

5. The Review Board finds that the pleadings before it raise a substantial question of misrepresentation to the Commission. It is clear that St. Cross relies upon its principals for its total financial support and that the financial statements of those principals submitted to the Commission to support their claimed ability to do so showed substantial assets which, in fact, did not exist at the time those statements were submitted. Such apparent misstatement raises a sufficient question to warrant the inclusion of an issue in this proceeding to determine whether St. Cross has misrepresented material facts to the Commission. *Cf. WIOO, Inc.*, 37 FCC 2d 140, 25 RR 2d 169 (1972). It is axiomatic that the regulatory scheme administered by the Commission must depend on the integrity of the applicants before the Commission and the accuracy of the information supplied by them. Thus, contrary to St. Cross' arguments, "no showing of materiality, advantage or that the Commission was, in fact, mislead is necessary for a finding of misrepresentation." *Seaboard Broadcasting Corp.*, 26 FCC 2d 649, 651, 20 RR 2d 786, 789 (1970). It is well established that a finding merely that true information is withheld and false information is substituted is enough to disqualify an applicant. See *FCC* v. *WOKO, Inc.*, 67 S.C. 213, 329 U.S. 223 (1946) and *Seaboard Broadcasting Corp., supra.* This is particularly true where the Commission's application form specifically calls for such information. (See FCC Form 301, Section III, Item 4).

6. We also disagree with St. Cross with regard to the materiality of the false information apparently submitted. We do deem a misrepresentation to be significant and material when 75%, 70% and 50% of the assets shown by an applicant's principals are virtually nonexistant, especially where the Commission contemporaneously has before it a petition to deny which is based, in part, on allegations regarding the financial status of the applicant. In such circumstances, the questions of whether the Commission ultimately would have added an issue had it possessed the correct information and whether other assets are sufficient to meet commitments to the applicant are not controlling. Furthermore, it is clear that St. Cross did not report the changes in the financial status of its principals within 30 days. Such changes are, in our view, substantial and may be of decisional significance and therefore, whether or not specifically required by the application form, must be filed pursuant to Section 1.65. See paragraph 7 of *Report and Order, Reporting of Changed Circumstances Affecting Applications*, FCC 64–1037, 3 RR 2d 1622. We will therefore specify the appropriate issue. Finally, the Board is of the view that neither Progressive nor the Broadcast Bureau has alleged facts

sufficient to indicate that St. Cross does not have sufficient current liquid assets to build and operate its proposed station for one year.[6]

7. Accordingly, IT IS ORDERED, That, the motion to strike unauthorized pleading, filed September 18, 1972 by the Broadcast Bureau, IS GRANTED, and the motion for leave to file pleading, filed September 12, 1972, by St. Cross Broadcasting, Inc. IS DENIED and the reply to comments of Broadcast Bureau, filed September 12, 1972, by St. Cross Broadcasting, Inc. IS DISMISSED; and

8. IT IS FURTHER ORDERED, That the motion for waiver of Section 1.229 and motion to enlarge issues, filed August 2, 1972, by Progressive Broadcasting Company, IS GRANTED to the extent indicated below, and IS DENIED in all other respects; and

9. IT IS FURTHER ORDERED, That the issues in this proceeding ARE ENLARGED by the addition of the following issues:

(a) To determine whether St. Cross Broadcasting, Inc. and/or any of its principals misrepresented facts to the Commission and, if so, the effect thereof on the qualifications of the applicant to be a broadcast licensee;

(b) To determine whether St. Cross Broadcasting, Inc. has complied with the provisions of Section 1.65 of the Commission's Rules by keeping the Commission advised of substantial changes in the financial status of its principals and, if not, the effect of such non-compliance on the basic or comparative qualifications of the applicant to be a broadcast licensee;

10. IT IS FURTHER ORDERED, That the burden of proceeding under the above SHALL BE on Progressive Broadcasting Company, and the burden of proof under the above issues above SHALL BE on St. Cross Broadcasting, Inc.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[6] We do note, however, that the September 5, 1972, amendment deleting reference to Telfon in the principals' financial statements includes references to a partnership formed by, *inter alia*, Anderson and Berman. Should this new enterprise significantly affect the principals' financial status, we would expect that information to be submitted pursuant to Section 1.65.

109-027—73——10

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of
SUMTER BROADCASTING CO., INC.
For a Construction Permit for a new
Class A FM Station at Americus, Ga.

FEBRUARY 1, 1973.

AMERICUS, GA., APPLICATION FOR NEW FM STATION GRANTED

An application by Sumter Broadcasting Company, Inc. for a construction permit for a new Class A FM station to operate on Channel 249 (97.7 MHz) at Americus, Ga., has been granted by the Commission (BPH–7775). The station will operate with power of 3 kw and antenna height of 300 feet. Sumter Broadcasting is the licensee of station WISK, Americus. One of its principals, L. E. Gadrick (secretary, treasurer, director and 50 percent stockholder) owns WPLK, Rockmart, Ga., and has a 75 percent interest in WIYN, Rome, Ga. The grant of the application was made without prejudice to whatever action the Commission may consider appropriate in light of its action with respect to outstanding complaints against stations WIYN and WPLK. (Action by the Commission January 23, 1973. Commissioners Burch (Chairman), Robert E. Lee, Reid and Wiley, with Commissioners Johnson and H. Rex Lee dissenting and issuing statements, and Commissioner Hooks dissenting.

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

Prior to last December 26, 1972, it had never been the practice of this Commission to grant or assign a license or construction permit to an applicant whose basic qualifications were being questioned in other Commission proceedings. On that date, in an appalling opinion that clearly violated § 309 of the Communications Act of 1934, the majority voted to allow RKO General to acquire another radio station "despite the fact that RKO's qualifications as a broadcast licensee have been called into serious question—and are currently unresolved—by this very Commission." See my dissenting opinion in *Assignment of WAXY–FM*, ——— F.C.C. 2d ——— or ——— Pike & Fisher R.R. 2d ——— (December, 1972).

Standing by itself, the WAXY decision might have been dismissed as a temporary aberration in the Commission's judgment. Today's decision, however, evinces an unmistakable intention on the part of the majority to establish a precedent that would simply emasculate the already precarious "public interest" in all proceedings involving the qualifications of a licensee.

It is one thing, of course, to eschew the phrase "public interest, convenience or necessity" as so ambiguous as to easily encompass a wide range of potential Commission actions. It has, indeed, become fashionable to so interpret Justice Frankfurter's famous elucidation of that standard, which concluded:

> The touchstone provided by Congress was "the public interest, convenience or necessity," a criterion which is "as concrete as the complicated factors for judgment in such a field of delegated authority permits."

NBC vs. United States, 319 U.S. 190, at 216 (1943). See, for example, Professor Harry Kalven's ruminations in "Broadcasting, Public Policy and the First Amendment," 10 *J. Law & Econ.* 15, 25–26, 41–45 (1967). There is no reason to assume, however, that the standard is so nebulous or so wanting of coherent construction as to encourage the apparent abandon we find in these cases.

Today's decision involves the grant of a construction permit for a new FM facility in Americus, Georgia, to the Sumter Broadcasting Company. Sumter is owned in equal share by two men, one of whom, L. E. Gradick, is also a 75% owner of the licensee of station WIYN (AM), Rome, Georgia, and 100% owner of station WPLK(AM), Rockmart, Georgia. WIYN was the subject of a July, 1971 Notice of Apparent Liability for forfeiture of $1000 for violation of the personal attack rule. In addition, the Broadcast Bureau has received no fewer than four separate complaints against WIYN alleging other numerous violations of our personal attack rules and the fairness doctrine including one complaint that named WPLK as well. These charges include the failure to provide a reasonable opportunity to reply to one alleged attack, failure to notify another group that it had been attacked or to provide time, and other allegations said to be of such serious nature that a complete Bureau investigation has been ordered. Violation of the personal attack doctrine is a serious offense which has been found in the past to go to the very heart of a licensee's qualifications to use the public airwaves. *Brandywine-Main Line Radio, Inc., for Renewal of Licenses of Stations WXUR and WXUR-FM, Media, Pa.*, 24 F.C.C.2d 18 (1970), *aff'd*, *Brandywine-Main Line Radio, Inc. v. F.C.C.*, ——— F.2d (Sept., 1972).

Under previous Commission policy, the Broadcast Bureau indicates that this case would never have been brought to our attention at this time, but rather held in abeyance until such time as the WIYN and WPLK charges had been acted upon. However, citing the authority of *WAXY* and the "informal" mandate handed them by the Commission at that time to "bring up" other such cases, Sumter's application has been processed by that Bureau and is now summarily granted by the majority, subject only to the "condition" that it might be *re*examined after the final resolution of those outstanding charges.

Of course, this method of regulation is absurd. As any student of administrative law can tell you, it is a rare commission or agency that has enough integrity to reverse more than one or two of its decisions a year. Any process of "re-examination", even based upon the occurrence of some specified condition, implies that a decision has already been made. Aside from the purely legal changes that occur in the rights and obligations of grantee and Commission alike, when a party has been licensed or granted some sort of permission to proceed with a commit-

ment of its resources, bureaucratic inertia is most often an insurmountable obstacle to reasoned reconsideration. Since the majority refused the suggestion that its grant in this case be made *automatically* conditional upon the outcome of the personal attack complaints, I would say that Mr. Gradick is safely in possession of a construction permit, with the clear implication that he is qualified in every way to hold one.

There is an important and dangerous line of precedent that has been established by these two cases (and by the large number of other, similar cases the Broadcast Bureau has been informally told to start bringing up). It begins to appear that a licensee whose qualifications are being challenged in one proceeding can procure a *de facto* adjudication in his favor by the simple expedient of applying for (and being granted) some additional license or permit while the former case is still pending. At the very least, he can create a good deal of momentum in his direction. There can be no question but that a ruling favorable to a licensee on any issue relating to his overall broadcasting qualifications must in some way prejudice the attempt to build a case against him in any other such matter before the Commission.

What the majority has accomplished today is far more than just the promulgation of yet another piece of bad law or bad policy; sorrowfully, it is the utter subversion of much of what is left of the orderly processes under which this Commission is supposed to uphold the public interest. If we can grant new licenses and permits to parties who are charged with serious personal attack and fairness violations (as in this case) or with significant antitrust allegations (the RKO–WAXY case), can we ever again deny an unchallenged application, without seeming arbitrary and capricious in the extreme? Congress itself could not have caused a greater degree of chaos for our procedures of factfinding, adjudication and review if it had repealed the public interest standard itself.

I dissent.

Dissenting Statement of Commissioner H. Rex Lee

I dissent to the conditional grant of the application of Sumter Broadcasting Co., Inc. for a construction permit for a new Class A FM broadcast station at Americus, Georgia, for essentially the same reasons articulated in my statement concerning the assignment of Station WAXY–FM, Fort Lauderdale, Florida, to RKO General, Inc.[1] One of the principals of the corporate applicant has substantial ownership interests in two Georgia standard broadcast stations.[2] which have either been subject to a forfeiture notice or been the target of pending complaints relating to alleged violations of the Commission's personal attack rule (section 73.123) and Fairness Doctrine. As a result, final action on Sumter's FM application should be deferred by the Commission pending ultimate resolution of outstanding matters that could have a real bearing on the assessment of the applicant's

[1] See FCC 72–1201, 26 RR 2d 228, relating to conditional grant of the application for assignment of the license of Station WAXY–FM, Fort Lauderdale, Florida, from Broward County Broadcasting Company to RKO General, Inc.

[2] L. E. Gradick is secretary-treasurer, director and 50 percent stockholder of Sumter Broadcasting Co., Inc. and is 100 percent owner of Station WPLK, Rockmart, Georgia, and 75 percent owner of Station WIYN, Rome, Georgia.

requisite qualifications. As I noted in my dissenting statement in the *RKO General* case, whether or not a licensee's conduct is of sufficient gravity to warrant revocation or denial of renewal, it is critical in determining whether a licensee should be entrusted with an additional broadcast facility.

F.C.C. 73-61

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of: TELEMUNDO, INC., MAYAGUEZ, P.R. Request for Emergency Authorization Pursuant to Section 309(f) of the Communications Act of 1934, as Amended	File No. BPTT-2452

MEMORANDUM OPINION AND ORDER

(Adopted January 17, 1973; Released January 24, 1973)

BY THE COMMISSION.

1. The Commission has before it for consideration its action of November 15, 1972, in the above-captioned matter (FCC 72-1023, released November 21, 1972), granting emergency special temporary authority, pursuant to section 309(f) of the Communications Act of 1934, as amended, to Telemundo, Inc., licensee of television station WKAQ-TV, channel 2, San Juan, Puerto Rico, to construct and operate a 100-watt UHF television broadcast translator station to serve Mayaguez, Puerto Rico, by rebroadcasting station WKAQ-TV on output channel 22, pending Commission action on Telemundo's application (BPTT-2452) for regular authority to construct and operate a 1,000-watt UHF translator on channel 22 in Mayaguez. On November 17, 1972, Quality Telecasting Corporation, licensee of station WORA-TV, channel 5, Mayaguez, Puerto Rico, filed a petition for reconsideration [1] of our grant of the special temporary authority (STA) to Telemundo. On November 28, 1972, Video Empresas del Oeste, Inc., permittee of a new UHF television station authorized to operate on channel 44, Aguadilla, Puerto Rico, filed comments in support of Quality's petition for reconsideration. We have these pleadings and associated pleadings [2] before us for consideration.

2. Quality claims standing as a party aggrieved or whose interests are adversely affected by grant of the STA by reason of the fact that it would compete with the translator for viewership in Mayaguez. We find that petitioner has standing. *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 60 S. Ct. 693, 9 RR 2008.

3. On November 1, 1972, Telemundo requested emergency STA. It stated that, with the exception of a period from February 1971 to December 1971, WKAQ-TV's programs were carried in Mayaguez for a period of 15 years by arrangements with one or another television

[1] The petition is entitled "Petition for Reconsideration and For Immediate Stay of Special Temporary Authorization." On December 6, 1972, the Commission denied Quality's petition for stay of the STA. *Telemundo, Inc.*, FCC 72-1109, released December 14, 1972.

[2] Telemundo filed an opposition to the petition for reconsideration on November 24, 1972, and Quality filed a response thereto on November 28, 1972.

station in Mayaguez, the last such arrangement being with Telesanjuan, Inc., for carriage over the facilities of UHF station WMGZ–TV, channel 16, Mayaguez, Puerto Rico. Such a "network" arrangement is common in Puerto Rico because of the extremely rugged terrain which precludes delivery of television signals over the western portion of the island from stations in the San Juan market.[3] In its request for STA, Telemundo stated that, on October 25, 1972, it learned that the general manager of station WMGZ–TV had informed the Commission, at a hearing being held in San Juan in Docket Nos. 19353–19355 (*Telesanjuan, Inc.*, on applications for renewal of the license of station WTSJ–TV, San Juan, and for licenses to cover the construction permits of station WMGZ–TV and WPSJ–TV, Ponce, Puerto Rico), that, effective the close of the broadcast day on November 30, 1972, Telesanjuan would discontinue its television operations in Puerto Rico. Telemundo stated that, with this development, there would be no way to continue WKAQ–TV's programs in Mayaguez unless emergency authority were granted for a translator operation pending action on the simultaneously-filed application for regular authority to construct and operate a 1,000-watt UHF translator on channel 22, Mayaguez. In order to avert the sudden loss of this existing television service to Mayaguez, the Commission granted emergency STA for 90 days, pursuant to section 309(f) of the Communications Act.

4. Quality asserts, correctly, that no such statement was made by the WMGZ–TV general manager at the hearing—he was, in fact, not present at the hearing—but that counsel for Telesanjuan advised the presiding Administrative Law Judge that Telesanjuan was dismissing its applications and terminating all of its television operations, the latter effective November 30, 1972. The reasons behind the decision were, according to counsel for Telesanjuan, twofold: unacceptable continuing financial losses aggravated by advice from Telemundo that it would not renew its contract to pay $180,000 to Telesanjuan to carry WKAQ–TV's programs in Mayaguez over the facilities of station WMGZ–TV, and the simultaneous resignation of the general manager. The official transcript of the proceeding supports Quality's assertions. From this, however, Quality erroneously concludes that Telemundo misled or deceived the Commission. The Commission, of course, was well aware of the fact that it was counsel for Telesanjuan, not the general manager, who announced the decision to discontinue operations. The identity of the person who made the statement to the presiding officer is, in our view, wholly immaterial and certainly does not constitute a deception practiced on the Commission. Telemundo has, in any event, explained this apparent discrepancy. Quality avers that Telemundo conveyed the impression, in its request for STA, that it was taken by surprise by the announcement, whereas, by advising Telesanjuan that Telemundo would not renew its contract, Telemundo itself was, in large measure, responsible for the decision to discontinue. As set out subsequently herein, there was apparently a misunderstanding between WMGZ–TV's general manager and Telemundo as to

[3] Station WRIK–TV, channel 7, Ponce, is carried in Mayaguez by WORA–TV (petitioner here) and station WAPA–TV, channel 4, San Juan, is carried in Mayaguez by station WOLE–TV.

Telemundo's intentions, but, even were this not so, we do not agree with the inference that, by indicating that it might cancel its contract, Telemundo knew that it would bring about the demise of Telesanjuan. Such an inference does not necessarily follow. The application for a translator and all exhibits were dated subsequent to Telesanjuan's October 25, 1972, announcement at the hearing and, had it been Telemundo's design to effect the collapse of Telesanjuan, it need not have waited so long to prepare an application for a facility to continue its service in Mayaguez. In brief, Quality's conclusion that Telemundo was not surprised because it was itself the instrumentality which caused Telesanjuan's demise, is not necessarily valid and is not supported by any facts to compel such a conclusion.

5. Attached to Telemundo's opposition are affidavits from Mr. K. Dean Stephens, former general manager of WMGZ–TV, and Mr. Rafael Ruiz, officer and general manager of WKAQ–TV. Mr. Stephens' affidavit recites that, on October 24, 1972, he received a telephone call from Mr. Ruiz complaining about the poor quality of the signal of station WMGZ–TV. Mr. Stephens' affidavit continues:

"He [Ruiz] indicated that our rebroadcast relationship could not continue under such poor engineering conditions on our part, and that WKAQ would not renew the rebroadcast agreement with Tele-San Juan *unless substantial improvements were forthcoming* immediately. I told him that I would be in conference with Tele-San Juan ownership that evening and would quite literally place my job in the balance. When I was told that no monetary assistance could come from within our company (Diversified Media, Inc.), I was rather certain that the WKAQ–TV rebroadcast agreement would not continue beyond the November 30, 1972, contract date and told this to Mr. Chalk." (Emphasis added).

Ruiz's affidavit describes the long negotiations with Telesanjuan on the expiring contract and Telemundo's dissatisfaction with the quality of the WMGZ–TV signals. Mr. Ruiz states, with respect to his October 24 telephone call to Mr. Stephens:

"I called Mr. Stephens to complain once again of the continuation of this unsatisfactory condition and emphasized the necessity of a firm commitment by Tele-San Juan to fulfill the prior assurance of WMGZ–TV's facilities improvement. Since this was no more than reaffirmation of an often expressed Telemundo expectation to which Mr. Stephens has informally indicated Tele-San Juan's recognition, there was no thought in my mind at the time that I had demanded anything more than what previously received informal acceptance by Tele-San Juan. I was surprised, therefore, to learn the next day that Tele-San Juan had formally requested dismissal of its application in hearing (including WMGZ–TV) with shut-down effective November 30th."

Mr. Ruiz's affidavit recites that a public announcement by Telesanjuan on October 25, 1972 identified Mr. Stephens as the spokesman for Telesanjuan and, upon seeing this announcement, Mr. Ruiz concluded, erroneously, that it was Stephens who had made the announcement at the hearing. Ruiz further states that it was not his intention or desire to terminate negotiations for renewal of the contract. He states that it was not until October 26th that Telemundo's engineers and legal counsel were directed to prepare the application for a translator and the request for STA.

6. We think that the explanation is logical and we are unwilling to attribute base motives to the applicant in the absence of a far stronger case than Quality's surmise and conjecture permits. More important, however, is the fact that, irrespective of who made the announcement

at the hearing or whether Telemundo was truly surprised, Mayaguez was threatened with the imminent loss of a long-existing television service. In our view, this alone justifies the emergency STA which we granted. Quality, however, insists that ". . . the mere cessation—temporarily or permanently—of such programming does not satisfy the strict statutory standard . . ." imposed by section 309(f) of the Communications Act. To support this proposition, it cites *Folkways Broadcasting Company, Inc.* v. *Federal Communications Commission*, 379 F. 2d 447, 9 RR 2d 2079 (U.S.C.A., D.C. Cir.). Quality's reliance on *Folkways* is misplaced, for that case does not stand for such a proposition. In *Folkways*, the court was considering the action of the Commission allowing an applicant whose basic qualifications were at issue to remain on the air following the court's remand and consequent return of the application to pre-grant status. *Folkways* did not involve section 309(f) of the Communications Act.

7. Finally, petitioner has failed to show any detriment to the public interest and, indeed, we can find none. It has made no effort to show that it will suffer such economic injury as to reflect adversely on the public interest nor that the public interest will be affected either favorably or unfavorably by the continuation of an existing service. Petitioner, furthermore, does not dispute the facts alleged by the applicant that Telemundo provides programming not available from any other source nor that Telemundo's programming is designed for and intended to meet the needs, tastes and interests of all of the island, not just San Juan. Mayaguez is within station WKAQ–TV's predicted Grade B contour and the application is consistent with the Commission's rules.

8. Video Empresas Del Oeste's comments may be considered as informal objections, filed pursuant to section 1.587 of the Commission's rules. They add nothing to the points raised by Quality. We note, however, that there can be no present injury to Video Empresas, for its authorization was granted little more than three months ago and the station has not yet been constructed. Video Empresas seeks to limit our authority to grant emergency STA to situations such as ". . . where a community has no existing service, or stands to lose its only service," citing *Community Broadcasting Co., Inc.* v. *Federal Communications Commission*, 107 U.S. App. D.C. 95, 274 F. 2d 753, 19 RR 2047. In that case, however, the court made it clear that it was concerned only with a situation where one of several competing applicants for regular authority to operate a television station was awarded STA. There, the court pointed out that a comparative hearing was required and that the STA to one of the applicants might seriously prejudice the other applicants. That case bears no similarity to the Mayaguez situation. The Commission's authority to continue an existing service in an area already served by other radio stations was sustained in *Beloit Broadcasters, Inc.* v. *Federal Communications Commission*, 125 U.S. App. D.C. 29, 365 F. 2d 962, 7 RR 2d 2155.

9. For the reasons discussed, we find that petitioner has raised no substantial or material questions of fact which warrant recision of our grant of emergency STA. The STA is valid for 90 days and may be renewed for an additional 90 days upon similar findings by the

Commission. Petitions to deny have been filed against the application for regular authority and we are adjured by the Communications Act to give expeditious consideration to petitions to deny which have been filed in these circumstances. We expect, therefore, to be able to dispose of this matter on its merits prior to the expiration of the STA period.

In view of the foregoing, IT IS ORDERED, That the petition for reconsideration filed herein by Quality Telecasting Corporation and the comments filed herein by Video Empresas del Oeste, Inc., ARE DENIED, and the Commission's action of November 15, 1972, granting emergency special temporary authority, IS REAFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73–73

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
VARIOUS METHODS OF TRANSMITTING PROGRAM MATERIAL TO HOTELS AND SIMILAR LOCATIONS	Docket No. 19671
and	
USE OF THE BUSINESS RADIO SERVICE FOR THE TRANSMISSION OF MOTION PICTURES OR OTHER PROGRAM MATERIAL TO HOTELS OR OTHER SIMILAR POINTS	
AMENDMENT OF PART 76, SUBPART G OF THE COMMISSION RULES AND REGULATIONS PERTAINING TO THE CABLECASTING OF PROGRAMS FOR WHICH A PER-PROGRAM OR PER-CHANNEL CHARGE IS MADE	Docket No. 19554
AMENDMENT OF SECTION 73.643(b)(2) AND 74.1121(a)(2) OF THE COMMISSION'S RULES AND REGULATIONS PERTAINING TO THE SHOWING OF SPORTS EVENTS ON OVER-THE-AIR SUBSCRIPTION TELEVISION OR CABLECASTING	Docket No. 18893
AMENDMENT OF PARTS 1, 2, 21 AND 43 OF THE COMMISSION'S RULES AND REGULATIONS TO PROVIDE FOR LICENSING AND REGULATION OF COMMON CARRIER RADIO STATIONS IN THE MULTIPOINT DISTRIBUTION SERVICE	Docket No. 19493
STERLING MANHATTAN CABLE TELEVISION, INC., COMPLAINANT	
v.	
NEW YORK TELEPHONE CO., DEFENDANT	
PETITION FOR CONSOLIDATION FILED BY AMERICAN BROADCASTING COMPANIES, INC.	
PETITION OF NATIONAL ASSOCIATION OF THEATRE OWNER'S, INC., TO IMPOSE A "FREEZE" ON THE FILING AND GRANT OF APPLICATIONS FOR THE USE OF RADIO FREQUENCIES IN CONNECTION WITH THE OPERATION OF CATV PAY-TV SYSTEMS AND/OR CHANNELS AND CLOSED CIRCUIT PAY-TV SYSTEMS	

Notice of Inquiry and Notice of Proposed Rulemaking Memorandum Opinion and Orders

(Adopted January 17, 1973; Released January 24, 1973)

By the Commission: Commissioners Johnson, Reid, and Wiley concurring in the result.

I

1. The Commission has before it for consideration several proceedings which involve the transmission by wire or radio communication of motion pictures to hotel master antenna systems for distribution to hotel rooms. These include the furnishing of closed-circuit video transmission service by the New York Telephone Company to Trans-World Communications (a division of Columbia Pictures Industries, Inc.), which is the subject of a complaint by Sterling Manhattan Cable Television, Inc.; applications of Columbia Pictures Industries, Inc. for microwave facilities in the Business Radio Service in several cities; recent grants to Midwest Corporation and others for construction permits in the Multipoint Distribution Service in three cities; and proposed rule making in Docket No. 19493 concerning use of the Multipoint Distribution Service. Although the distribution systems involved differ in technology and include both private and common carrier systems, they raise common questions of potential competition with commercial television broadcast transmissions and cable television, and potential "siphoning" of program material from free television, in addition to certain issues separately applicable to each method of program distribution. Furthermore, we also have pending other proceedings concerning the "siphoning" issue in the use of subscription television and cablecasting (see Dockets Nos. 18893, 19534).

2. In order to consider these common questions together, the Commission has decided to issue this Notice of Inquiry and Notice of Proposed Rule Making. The basic issue upon which we seek the comment of interested persons is whether, assuming that the various proposed new methods of supplying motion pictures or other mass entertainment to hotels are otherwise in the public interest, they should nevertheless be restricted in order to prevent or limit the competitive effect upon television broadcast service or cable television service. In adopting rules for a subscription television service,[1] we determined that "free" television service to the public should be protected against the siphoning of certain program material for which the public now pays no direct charge. (See Section 73.643 of the Rules and Regulations, 47 CFR 73.643.)[2] For the same reason, we imposed essentially the same restrictions upon programs cablecast for pay upon a per-channel or per-program basis by cable television systems. See Section 74.1121,

[1] *Subscription Television*, 15 F.C.C. 2d 466 (1968), affirmed *National Association of Theatre Owners* v. *F.C.C.*, 420 F. 2d 194 (C.A.D.C. 1969), *cert. den.* 397 U.S. 922.

[2] In Docket No 18893, *Showing of Sports Events*, 34 F.C.C. 2d 271 (1972), we revised those rules as they apply to over-the-air subscription television, with particular regard to sports events. Although we had requested comment on applying the changes to cablecasting, we left that subject for later and separate treatment. Petitions for reconsideration of Docket No. 18893 are pending, but not on this latter question, reconsideration having been denied as to the determination to take up the cablecasting limitations separately. (35 F.C.C. 2d 893 (1972).)

CATV, 23 F.C.C. 2d 825 (1970), now Section 76.225 (37 F.R. 3288). In Docket No. 19554, *Cablecasting Program Charges*, 35 F.C.C. 2d 893 (1972), we requested further comments on the rules governing cablecasting, including the changes with respect to sports programs adopted in Docket No. 18893 for subscription television. The issues now before us are somewhat different, since the presently proposed modes of supplying motion pictures to hotels do not directly convert "free" channels of television broadcasting to pay use, as is the case with subscription television, and do not rely upon television broadcasting to supply basic program material, as is the case with cable television systems. Nevertheless, the questions remain of whether the newer modes will in fact affect the public's receipt of motion pictures or other program material on the other media and, if so, whether it is appropriate for the Commission to adopt similar, or different, restrictions for the new modes, modify the existing restrictions on pay cablecasting and subscription television, or take other remedial action. We are aware that the proposals now before us concern only the supplying of motion pictures to hotels, but the potential for a wider distribution of this and other material would appear to be present, as is the potential for a wider interconnection than now appears to be involved. We stress that this proceeding seeks data as to the trends in these new services and the possible impact of such trends on the public interest. Our action, therefore, may go beyond the hotel/motel aspects and include apartment buildings and similar predominantly non-transient locations.

3. It might have been feasible to consider the competition issue separately with respect to each matter before us involving the transmission of motion pictures to hotels by wire or radio. However, despite the technological differences among them, and the separate questions raised by each mode which apply only to it, we believe it preferable to treat the issue of competitive effect on an overall basis, since this issue is essentially the same with respect to each. Policy in this area should not be made on a piecemeal basis. We therefore request comment, with a view toward the adoption of final rules, on the question of whether we should limit the nature of material transmitted to hotel television receivers (or receivers in other institutions or private homes) by common carrier wire or radio, non-common carrier wire or radio, or laser techniques, in order to prevent the loss of such material by television broadcast stations or cable television systems, or otherwise limit or prevent any such competitive effect upon these services as would be contrary to the public interest. In this regard, we seek information and views on the nature of existing and potential transmission methods, their impact on other services and the policy appropriate to their regulation. Is free competition or limited competition more in the public interest, taking due account of the nature of the respective services? If restrictions on free competition are desirable, what should they be—should they be similar to those now in effect for subscription television and pay cablecasting, or should they include more less program material? Should they apply to transmissions to any television receivers, even if such transmissions are limited to hotels serving primarily transients, or should they take effect only where a larger or non-transient audience is involved? If the latter, at what point should they come into play? Should we consider relaxing the existing

restrictions on pay cablecasting and subscription television rather than impose conditions upon the new services? Finally, should these forms of transmission be required to provide other services required of cable television systems? If so, what should be the form of the rule change (e.g. expanding the definition of a cable system to include hotel or apartment building systems)?

4. During the period we are considering the questions raised in this proceeding, we believe cable systems should be able to compete on an equal footing for the hotel/motel motion picture distribution business. By this we mean in competitive situations those cable systems desiring to transmit motion pictures to hotels or motels (i.e., accommodations used predominantly for transient occupancy) should not be required to adhere to our 2–10 year film restriction (i.e., Section 76.225(a)(1) of our rules). Therefore in the aforementioned situation where a cable system is in competition with a non-cable television program distribution system within the cable system's franchise area, we will waive upon appropriate request Section 76.225(a)(1) of our rules with respect only to cable transmission to hotels/motels. A cable system may file for a waiver in the very early stages of a competitive situation, and in any event it and the hotel/motel entrepreneur may proceed with negotiations in such competitive situations with the assurance that a waiver will be forthcoming.[3]

5. Authority for the proposed rule making and inquiry instituted herein is contained in Sections 2, 3, 4 (i) and (j), 201, 214, 301, 303, 307, 308, 309, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 152, 153, 154 (i) and (j), 201, 214, 301, 303, 307, 308, 309, and 403.

In accordance with the provisions of Section 1.419 of the Commission's rules and regulations, an original and 14 copies of all comments, replies and other pleadings shall be filed. Written comments should be filed on or before May 21, 1973, and reply comments on or before July 23, 1973.

II

6. We also have before us the petition of American Broadcasting Companies, Inc. (ABC) for consolidation of the rule making proceedings in Docket Nos. 19554, 18893 and 19493, the Sterling Manhattan Cable Television complaint and the applications of Columbia Pictures for microwave licenses, insofar as these matters relate to the "siphoning" of program material from free television.[4] Several parties have opposed this request. We agree with ABC, as indicated above, that there is a competitive impact issue common to the transmission methods other than subscription television and cablecasting which should be treated in one proceeding. However, we do not agree that all of the pending matters should be consolidated. We will proceed with them, and dispose of the ABC petition, in the manner set forth below.

7. Docket No. 19554, concerning the cablecasting of programs for which a per-channel or per-program charge is made, has been before

[3] We stress that our willingness to entertain the above waivers of the 2–10 year film restriction is a temporary measure designed to apply until the proceeding we are instituting today is finally resolved. This action is in no way indicative of any decision we might reach in Docket 19554.

[4] The Illinois Commerce Commission has also sought consolidation.

us since June 1970. Throughout this proceeding we have indicated our desire to expedite its resolution. When we adopted our July 19, 1972 *Notice of Proposed Rule Making and Memorandum Opinion and Order*, we said at page 8,

"We will make every effort to expedite resolution of this proceeding and expect to adhere to this proposed time table."

Later, on September 27, 1972 when we extended the time for filing comments and reply comments for a period less than that requested, we said:

"In issuing the *Notice* in this proceeding we indicated our intention to complete it expeditiously. Expedition was felt to be especially desirable because the existing rules were to be retained during the course of the proceeding although they had been subject to serious criticism on both procedural and other grounds."

We reiterate this view and believe that a consolidation of this proceeding with the other captioned matters would cause an unnecessary delay. The issues surrounding pay cablecasting are sufficiently distinct to be handled separately, and we see no need to delay their resolution while we investigate the potential effect of the other methods of program transmission which are the subject of our inquiry. In our July 19, 1972 *Notice* we restated the relevant questions and said we would take into consideration prior comments on these questions and any new comments relating to them. We also proposed to receive comments on four questions listed by ABC.[5] Since the particular questions relate to our pay cable policy, we feel it appropriate to decide them in Docket 19554. This will not deprive us of the flexibility to change these rules if necessary or to take notice of comments received on these questions and the effect of any decision made by us in this Docket upon the proceedings begun today.

8. Docket No. 18893 is virtually completed. The only matters left for decision are questions concerning clarification of amended Section 73.643(b)(2) adopted in our Report and Order of March 23, 1972 (34 F.C.C. 2d 271). This being so, and because of the separate policy questions relevant to subscription television which, as we noted above, directly displaces traditional television broadcasting, we see no reason to order a consolidation of this docket with all the other captioned matters which would substantially delay a decision we can make very soon.

9. Docket No. 19493 involves a number of issues beyond those which are the subject of our notice and inquiry herein. However, it also involves basically similar competitive questions. Thus, in the *Notice of Proposed Rule Making* released on April 26, 1972, 34 F.C.C. 2d 719, at 722, we stated:

"The future development of this service is not entirely clear at this time. The various uses as projected by the applicants appear to be limited to instructional and business closed circuit television. While we do not anticipate that these facili-

[5] 1. What are the legal, technical, and economic differences between over-the-air subscription television and pay cablecasting?
2. Are there, as the Department of Justice suggests, means of protecting the viewing public by less restrictive means than the existing rules?
3. Are the rules appropriate for and how should they be administered with respect to access and leased channel cablecasting for which there is a per-program or per-channel charge and not subject to the control of a cable television operator?
4. Have there been significant and relevant changes in the motion picture industry that should be reflected in the rules?

ties would be used to reach a mass market for closed circuit entertainment programming, a substantial entertainment market would appear to be possible. For example, an entrepreneur could arrange through the carrier to have programming (e.g., sports of movies) distributed for several hours a day or week to a number of hotels in a city, or in several cities if intercity connections were provided. While such arrangements would not be likely to reach the mass audiences anticipated in connection with subscription television or cablecasting, the audience could be substantial nonetheless. Therefore, we raise the question whether some anti-siphoning rules similar to those adopted in our Report and Order in Docket No. 18893, released March 29, 1972 (FCC 72–263), would be appropriate. We solicit comments on this question, including whether and to what degree this service is likely to develop into a device for serving substantial entertainment audiences. It is appropriate to note that other types of common carrier facilities, e.g., point-to-point microwave and cable, are also used for closed circuit television distribution. Therefore, it is possible that the Commission may want to consider the matter in a broader context than this proceeding."

Because we have already asked for comments on this subject, we will extract from Docket No. 19493 those comments which deal with it, and include them in the proceeding we are instituting today.

10. We are also today ruling upon the Sterling Manhattan Cable Television complaint against New York Telephone Company in a separate document. The issues raised there are consolidated herein to the extent already indicated.

III

11. In another action today, we have made a partial grant of applications filed by Columbia Pictures for microwave facilities in the Business Radio Service in the 12200–12700 MHz band. Our grants authorize Columbia Pictures to use private microwave to distribute motion pictures to hotels for viewing by the hotel guests and for distributing information about the movies available and the starting time of each feature. We have not granted Columbia Pictures proposals to use microwave radio channels for convention coverage and for transmission of paid advertisements associated with information about services, facilities and attractions in the city. Further, we have conditioned our grants on the outcome of this proceeding because, although we concluded that the partial grants are consistent with existing rules, we believe a broad review of this type of use of Business microwave facilities is desirable.

12. Accordingly, we request comments on the following questions: (a) whether the microwave frequencies available in the Business Radio Service should be used for the transmission of motion pictures or other program material to hotels or to other reception points on a subscription basis; (b) if this service is to be authorized, what, if any, program transmission restrictions should be imposed, and what should be its relationship to cable television services; (c) more generally, comments are requested on whether Business microwave frequencies should be used for distribution by the licensee of his product for which a charge is made (such as motion pictures, music, etc.), or his services (such as computer service) to his customers; (d) whether private systems for convention coverage and transmission of information supported by advertising should be authorized; (e) assuming the services described in (a), (c) and (d) above are to be permitted, comments are requested on the impact of each on the spectrum space available in the Business

Radio Service and on whether a new radio service, perhaps on frequencies above 12700 MHz, should be established.

13. Resolution of these issues may result in amendment of the rules governing the use of the Business Radio Service or new proposals for the creation of a new service. Authority for the proposed amendments is in Sections 301, 303, 307, 308, 309, and 316 of the Communications Act of 1934, as amended, 47 U.S.C. 301, 303, 307, 308, 309, and 316. The time for filing comments on these issues is the same as that set forth above with respect to the general competitive impact issues.

IV

14. In reaching its decisions in these matters, the Commission may take into account any relevant information before it in addition to the specific comments received. Responses will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters in Washington, D.C.

15. In view of what has been set forth above, the petition of American Broadcasting Companies, Inc., and that of the Illinois Commerce Commission ARE GRANTED to the extent indicated and otherwise ARE DENIED.

16. The petition of the Theatre Owners of America is also DENIED. Their request for a stay across-the-board of all grants of applications for the use of the spectrum in connection with pay cable or the provision of program material to hotels is unsupported by any showing warranting the grant of this drastic relief, either in terms of private or public injury or problems of spectrum scarcity.

FEDERAL COMMUNICATIONS COMMISSION.
BEN F. WAPLE, *Secretary.*

109-027—73——11

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of
WDSU–TV, INC., ASSIGNOR
and
COSMOS BROADCASTING OF LOUISIANA, INC.,
ASSIGNEE
For Assignment of License of Station
WDSU–TV, New Orleans, La.

NOVEMBER 29, 1972.

THE COMMISSION BY COMMISSIONERS BURCH (CHAIRMAN), ROBERT E. LEE, REID, WILEY AND HOOKS, WITH COMMISSIONER H. REX LEE CONCURRING AND COMMISSIONER JOHNSON DISSENTING AND ISSUING A STATEMENT, APPROVED THE ABOVE ASSIGNMENT OF LICENSE.

WDSU–TV, NEW ORLEANS, LA., LICENSE ASSIGNED TO COSMOS BROADCASTING OF LOUISIANA, CONSIDERATION $16,000,000

Application for assignment of license of station WDSU–TV, New Orleans, La., from WDSU–TV, Inc. to Cosmos Broadcasting of Louisiana, Inc., has been granted by the Commission. Total consideration for the assignment is $16,000,000.

Cosmos Broadcasting of Louisiana, Inc., is 100 percent owned by Cosmos Broadcasting Corp., licensee of WIS–AM–TV, Columbia, S.C., WSFA–TV, Montgomery, Ala., and WTOL–TV, Toledo, Ohio.

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

In an effort to ward off the rise of monolithic control over the nation's broadcast stations, the Federal Communication Commission promulgated rules against multiple ownership of television stations. Those rules—which limit the maximum number of VHF stations which may be controlled by a single institution or individual—sought to ensure that the benefits of diversity of ownership would not be curtailed.

Today the majority—with a logic conspicuous by its absence—makes a mockery of its own rules and the public interest.

At issue is the question whether Cosmos Broadcasting of Louisiana should be allowed to purchase, for a whopping $16 million, television station WDSU–TV in New Orleans.

Cosmos is the wholly owned subsidiary of Cosmos Broadcasting Corporation which, in turn, is owned by the Liberty Corporation. Fourteen per cent of Liberty is held in trust by the South Carolina National Bank of Charleston (SCN). Through its subsidiary—Cosmos

Broadcasting Corp.—Liberty already owns three VHF stations, one in Columbia, South Carolina, one in Montgomery, Alabama, and one in Toledo, Ohio. SCN, along with its 14% share of Liberty, also holds, in trust, 3.2% of Multimedia, Inc., which is the licensee of three VHF stations, one in Greenville, South Carolina, one in Knoxville, Tennessee, and one in Macon, Georgia. SCN also holds, in trust, 4% of Sparten Radio Casting Co., licensee of a VHF station in Spartanburg, South Carolina.

In other words, the South Carolina National Bank of Charleston has substantial financial interests in seven VHF broadcast stations. With today's transfer, it will acquire an interest in an eighth VHF station.

The Citizens and Southern National Bank of Charleston also owns a piece of Liberty, holding in trust a 1.3% voting interest. Citizens also owns 2.2% of the State Record Co., which controls two VHF stations—one in Charleston and the other in Lubbock, Texas. With today's transfer, the Citizens Bank will win a substantial financial interest in a sixth VHF station.

Today's assignment does not merely reward these two banks with another in their expanding line of VHF interests. It also rewards Mr. John I. Smith with an interest in a seventh such station. Mr. Smith is a director and 1.319% owner of Liberty. He is also a director of the People's National Bank of Greenville, South Carolina which holds a 6.4% voting interest in Multimedia, Inc.

Given the majority's blithe approval of today's transfer, one would never suspect that the FCC has actually promulgated rules (45 CFR § 72.636(a)(2)) which preclude one institution or individual from owning interests in more than one VHF station if the resulting concentration of media control violates the public's interest in a diversity of broadcast views. Nor could one imagine that those same rules define ownership of more than five VHF stations as a *per se* violation of the public interest.

And the reason a casual observer of the FCC would never be aware of these rules is that the FCC has, through this and other decisions, robbed those rules of their vitality, ignored their commands, pretended that both the rules and their underlying justifications do not exist.

Today's acquisition will give the assignee's parent, Cosmos Broadcasting Corporation, the license to its fourth VHF station. Yet, the majority does not even bother to ask whether such multiple ownership of four VHF stations—three of which are in the same geographic region of the country—poses public interest problems. Instead, the majority has apparently decided that, absent ownership of more than five VHF stations, there is no need to inquire into whether an acquisition could violate our policy favoring a multiplicity of broadcast views. This holding has the obvious effect of converting our definition of what constitutes a *per se* violation of the public interest into *the only possible* violation.

Such an amendment to our multiple ownership rules in the absence of a formal rulemaking proceeding is, of course, lawless. It is also blatantly contrary to the public interest. Our rules demand that, in cases such as this, we examine the extent of the assignee's concentration

of media control, and that we do so through a hearing wherein the facts might be forthcoming.

Nor does the majority stop there in its attempts to emasculate our multiple ownership rules. Aware of the fact that, as the result of this acquisition, two banks will win substantial interests in more than five VHF stations, the majority must find some way to ignore its own definition of what sort of ownership constitutes a *per se* violation of the public interest. This it does through reference to a prior—and equally horrendous—ruling.

In May of this year, the majority raised from 1% to 5% the amount of stock in diverse broadcast stations which banks may hold in trust without being attributed with "ownership" of those stations. Multiple Ownership Rules, 34 F.C.C. 2d 889 (1972). While individuals are attributed with ownership if they own more than 1% of such stations, mutual funds may, oddly enough, escape scrutiny and still own up to 3%.

And, inexplicably, America's most powerful financial institutions—the bankers—are now permitted to own up to 5% of an ever-increasing number of broadcast interests, so long as they assure the Commission that they will not exercise control over those interests. In reaching this peculiar result, the majority solicited neither the views of the Justice Department's antitrust division, nor the views of the House Banking Committee. It chose instead to operate in the intellectual vacuum of political expediency. As I suggested in my dissenting statement, the single unifying thread of the majority's opinion appeared to be a search for the most efficient means of avoiding substantial divestiture.

By today's action, the majority has enlarged upon its favored treatment afforded to banks. So subtle is the enlargement, in fact, that the majority does not even bother to allude to it. In its May rulemaking the majority obviously was concerned about the economic effects of divestiture. Today's action not merely insulates the two banks from this remedy, but permits them to *expand* upon their acquisitions! And this in spite of the fact that the transfer of WDSU–TV will enable these banks to increase their domination over the airwaves in one region of the country—the South. As I noted in my prior dissent:

> Surely substantial bank ownership, even of less than five per cent, of several close competitors, in [one] . . . region should be viewed differently from bank holdings of five per cent in widely-scattered licensees.

But the majority did not agree then, and it clearly does not agree now.

The South Carolina National Bank, in fact, already has sizable interests in three VHF stations in the same state—South Carolina. Through its 14% share of Liberty, SNC has an interest in WIS–AM–TV in Columbia. Through its 3.2% share of Multimedia, Inc., SNC owns an interest in WFBC–AM–FM–TV in Greenville. And through its 4% share of Sparten Radio Casting, SNC controls an interest in WSPA–AM–FM–TV in Spartenburg. A casual glance at *Television Factbook* reveals that both the grade A and grade B contours of all of three stations overlap substantially, thus giving SNC considerable

control over three VHF stations in the same market—something which our rules are supposed to prohibit, 47 CFR § 73.636(a)(1).

Today's assignment may not enlarge SNC's control of broadcasting in South Carolina, but it certainly enlarges SNC's control over the airwaves throughout the southern part of America. The majority—which often appears oblivious to the problems inherent in massive cross and multiple ownership of broadcast interests—is not impressed. The banks own less than 5% of these VHF stations, so that's the end of the inquiry.

Perhaps realizing the dangers in affording such favored treatment only to banks, the majority also decides—in the total absence of a formal rulemaking—to extend such protection to individuals. Though this may solve the problem of inequitable treatment inherent in the majority's May *Report and Order*, it completely vitiates our cross and multiple ownership rules.

By today's acquisition, Mr. John I. Smith will possess a greater than 1% interest in seven VHF stations. Because Mr. Smith has promised that he will not participate in any activities of the Peoples National Bank of Greenville with respect to that bank's broadcast interests, Mr. Smith's additional broadcast acquisition does not offend the majority. Yet, Mr. Smith cannot be serious when he vows to exclude himself from the People's Bank's actions with respect to its interests in Multimedia, Inc. For, Mr. Smith is a director of that bank, and to exclude himself from the bank's investment policies would almost certainly expose this director to serious legal actions for breach of his fiduciary duty to the bank's investors.

It is noteworthy—but not surprising—that the majority does not even mention the concept of "fiduciary duty."

I dissent.*

*Subsequent to the Broadcast Bureau's preparation of the majority's opinion, the Bureau advised the Commission that Multimedia, Inc. currently owns not three VHF stations, but four—the fourth being WSTS in Winston-Salem, North Carolina. Thus, through today's transfer, the South Carolina National Bank of Charleston will acquire a sizable interest in its ninth VHF station, and Mr. Smith will receive an interest in his eighth such station. By now, of course, it is obvious that the majority is not troubled by mere numbers. And so, aside from a few typographical corrections, its opinion and result remain unchanged. Our multiple ownership rules, however, do not.

F.C.C. 73-98

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of WALTER E. WEBSTER, JR., RECEIVER, ASSIGNOR and STERLING THEATRES CO., ASSIGNEE For Assignment of Licenses of Stations KTW-AM and FM, Seattle, Wash.	BAL-7494 and BALH-1618

JANUARY 23, 1973.

WALTER E. WEBSTER, Jr.,
Receiver, 1505 Northern Life Tower, Seattle, Wash.

Mr. FREDERIC A. DANZ,
Sterling Theatres Co., 1975 John Street, Seattle, Wash.

Mr. and Mrs. NORWOOD J. PATTERSON,
Suite 3005, 666 East Ocean Boulevard, Long Beach, Calif.

Mr. S. H. PATTERSON,
c/o Norwood J. Patterson, Suite 3005, 666 East Ocean Boulevard, Long Beach, Calif.

GENTLEMEN AND MRS. PATTERSON: This refers to the applications for assignment of the licenses of Stations KTW AM & FM, Seattle, Washington from Walter E. Webster, Jr. (Receiver) to Sterling Theatres Company (BAL-7494 and BALH-1618).

As you are aware, when the applications were before the Commission on November 22, 1972, the Commission concluded the overall public interest would best be served by deferring action on the applications until the U.S. Circuit Court of Appeals for the Ninth Circuit had rendered a decision in the proceeding styled *In the Matter of Nordawn, Inc.*, Case No. 71-2990. The Commission's letter of November 22, 1972 further indicated that in any event, before the applications could be granted, a hearing on three proposed issues would be required. Those issues involved (a) the *bona fides* of Sterling's ascertainment survey, (b) compliance with the Primer requirements respecting linkage of ascertained community problems to proposed programming, and (c) compliance with Section 73.242 of the Rules.

On January 11, 1973, Sterling Theatres filed a "Request for Immediate Grant" and certain amendments to the applications which are said to obviate the need for a hearing. Our concern here is with the "Request for Immediate Grant". The principal argument advanced in support of that Request is that our earlier deferral of action pending a decision on Nordawn's appeal is inconsistent with a long line of precedents in renewal and assignment proceedings (including several recent proceedings) wherein applications have been granted, sub-

ject to the outcome of the pending litigation. Assignee requests that a grant similarly conditioned be made here. In making this Request, Sterling further contends that in view of the affidavits submitted by lawyers familiar with the pending bankruptcy appeal, ". . . there is very little likelihood of the Court taking any action which would invalidate the purchase agreement." The Receiver fully supports the Request in a letter dated January 17, 1973. By their letter dated January 22, 1973, Norwood and Gloria Patterson, S. H. Patterson, and Nordawn, Inc., oppose the Request.

We have carefully considered the Request, but we are not persuaded the merits of the applications should be reached until the Ninth Circuit Court of Appeals has rendered its decision. The proceedings relied on in the Request are clearly distinguishable from the present proceeding in one vital respect: none of them involves pending litigation which challenges the *assignor's* (here the Receiver's) authority to enter a contract assigning a license. In this respect, the present proceeding is more closely allied to a renewal proceeding which looks to denial of a renewal and consequent termination of operating authority. In that situation, since there may be no license to assign, the Commission has deferred action on any attempted assignment until the threshold renewal matters are resolved.

It may well be that the prospect of any action by the Appeals Court which would invalidate the purchase contract is remote. But the opinions of counsel submitted earlier to us (and referred to in the Request) on the question of whether a reversal of the U.S. District Court would require removal of the Receiver, and if so, what effect such a removal would have on the status of the licenses in the event Sterling had already consummated the assignments, were conflicting. For these reasons, a conditional grant would not adequately safeguard the public interest because, in the event consummation occurs before a decision, it might give rise to intervening equities (here, the use of Sterling Theatres' purchase money to pay off Nordawn's creditors) or future litigation which would unnecessarily cloud the status of the licenses. Accordingly, we remain of the view that the overall public interest would best be served by deferring action until the Court of Appeals has rendered its decision. Hopefully, in view of the "Motion for Early Hearing" filed by the Receiver in the appeal, that decision will not be long delayed.

Commissioner Reid concurring in the result; Commissioner Wiley not participating.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

F.C.C. 73-162

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF WEST JERSEY BROADCASTING CO., LICENSEE OF RADIO STATION WJJZ, MT. HOLLY, N.J.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted February 7, 1973; Released February 9, 1973)

BY THE COMMISSION: COMMISSIONER H. REX LEE ABSENT.

1. The Commission has under consideration (1) its Notice of Apparent Liability dated February 9, 1972 addressed to West Jersey Broadcasting Company, licensee of Radio Station WJJZ, Mt. Holly, New Jersey, and (2) licensee's response to the Notice of Apparent Liability dated March 10, 1972.

2. The Notice of Apparent Liability in this proceeding was issued because of licensee's apparent willful or repeated violation of:

(1) Terms of the station authorization and Section 73.67(a)(6) of the Commission's Rules: Failure to read and enter in the operating log the indications at the transmitter of the common point current, base currents, phase monitor sample loop currents, and phase indications, within two hours of commencement of operation on March 16, 1971, and April 8, 1971.

(2) Section 73.111(a) of the Commission's Rules: The entries of operating parameters, as required by Sections 73.67(a)(6) and 73.113, in the operating logs of March 16, 1971, between the hours of 6:00 a.m. and 7:30 a.m. EST and on April 8, 1971, between the hours of 7:30 a.m. and 8:00 a.m. EST, by Bruce M. Schiller, operator license number P1-3-8889, were made without actual knowledge of the facts required, in that Mr. Schiller was not on duty either at the transmitter location or remote control point.

(3) Section 73.111(a) of the Commission's Rules: The entries of operating parameters as required by Section 73.113, made in the operating log of March 16, 1971, at 8:00 a.m. EST by Ronald J. Aicher, license number P1-3-8909, were made without actual knowledge of the facts required in that Mr. Aicher did not arrive at the remote control point at the Washington Hotel until 8:05 a.m. EST.

(4) Section 73.93(e) of the Commission's Rules: Failure to make a complete inspection by an operator holding a valid radiotelephone first class license of all transmitting equipment in use 5 days each week, as evidenced by the maintenance logs for the weeks ending December 20, 1970, March 14, 1971, April 4, 1971, and April 11, 1971.

(5) Section 301 of the Communications Act of 1934, as amended, by using a Gates Type Vanguard II auxiliary transmitter regularly for presunrise broadcasting from a date prior to January 1, 1971 through April 8, 1971; a license for this transmitter has not been issued by the Commission.

3. The Notice of Apparent Liability indicated that the licensee was subject to apparent liability for forfeiture in the amount of Two Thousand Dollars ($2,000) pursuant to Section 503(b)(2) of the Communications Act of 1934, as amended. The proceeding was con-

fined to violations occurring within one year prior to the issuance of the Notice of Apparent Liability.

4. In response to the Notice of Apparent Liability the licensee does not dispute the existence of the violations but requests a reduction in the amount of forfeiture. As grounds for this request the licensee urges consideration of certain factors, which may be summarized as follows: (a) WJJZ is the only local radio facility in the area; (b) the station is owned by local residents and is locally oriented to serve the Mt. Holly-Burlington area; (c) the owners are local businessmen without radio experience (except for one stockholder) who have been required to depend upon the station's professional staff who were responsible for virtually all of the violations; (d) the station has an operating deficit of a considerable amount which required additional capital contributions by the stockholders; (e) the study of the violations, the preparation of replies to the citations for violations, and the corrective actions taken have already cost the station more than $2,000; and (f) the legislative history of the forfeiture provisions of the Act makes clear that those provisions were not viewed essentially as punitive devices but rather as educational in nature, which should be especially the case regarding small stations with limited resources or those in loss positions.

5. In the licensee's reply to the original Notice of Violation issued by the Field Engineering Bureau, the licensee stated that the station was operated by local businessmen and civic leaders who had no previous experience in operating a broadcast facility and who therefore were required to rely heavily upon its professional staff. The reply further stated that the station had suffered losses and a substantial deficit. Thus, the Commission fully considered these matters before adopting the Notice of Apparent Liability for forfeiture in this proceeding. Licensee urges as new matter that a substantial sum ($2,000) has been expended in preparing replies to the citations and for corrective actions and argues that the forfeiture provisions of the Communications Act should be used for educational purposes rather than as punitive devices. However, in the early case of *Crowell-Collier Broadcasting Corp.*, 21 RR 2d 921, 927 (1961) we stated:

> We intend to use the forfeiture proceeding, as we believe it was intended to be used, to impel broadcast licensees to become familiar with the terms of their licenses and the applicable Rules, and to adopt procedures, including periodic review of operations, which will insure that stations will be operated in substantial compliance with their licenses and the Commission's Rules.

We have also held that licensee's are responsible for the acts or omissions of their employees. *International Broadcasting Corp.*, 19 FCC 2d 793 (1969), and that a licensee will not be excused for past violations because of subsequent corrective action, *Executive Broadcasting Corporation*, 3 FCC 2d 699 (1966). The licensee's financial reports were considered by the Commission before issuance of the Notice of Apparent Liability.

6. In view of the foregoing, IT IS ORDERED, That West Jersey Broadcasting Company, licensee of Radio Station WJJZ, Mt. Holly, New Jersey FORFEIT to the United States the sum of Two Thousand Dollars ($2,000) for repeated failure to abide by the provisions of the station authorization, Sections 73.67(a)(6), 73.93(e), and

73.111(a) of the Commission's rules, and Section 301 of the Communications Act of 1934, as amended. Since we have found these violations to have been repeated, we find it unnecessary under the Communications Act of 1934, as amended, to make any additional determination as to whether the violations were willful. *Paul A. Stewart*, FCC 63–410, 25 RR 375. Payment of this forfeiture may be made by mailing a check or similar instrument to the Commission drawn to the order of the Treasurer of the United States. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules an application for mitigation or remission of forfeiture may be filed within thirty (30) days of the date of receipt of this Memorandum Opinion and Order.

7. IT IS FURTHER ORDERED, That the Secretary of the Commission send a copy of this Memorandum Opinion and Order by Certified Mail—Return Receipt requested to West Jersey Broadcasting Company, licensee of Radio Station WJJZ, Mt. Holly, New Jersey.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73R-69

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
WIOO, INC., CARLISLE, PA.	Docket No. 19468
HOWARD J. HILTON, JOHN E. MCGOWAN, AND JOHN E. HILTON, DOING BUSINESS AS HILTON, MCGOWAN & HILTON, CARLISLE, PA.	File No. BPH-6572 Docket No. 19469 File No. BPH-6631
ALEXANDER CONTRACT AND SYLVIA CONTRACT, DOING BUSINESS AS CUMBERLAND BROADCASTING CO., CARLISLE, PA.	Docket No. 19471 File No. BPH-7404
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted February 7, 1973; Released February 9, 1973)

BY THE REVIEW BOARD.

1. In a petition to enlarge issues, WIOO, Inc., argues for the addition of an issue questioning whether Cumberland Broadcasting Company, in its original application, incorrectly represented the terms and conditions of a loan commitment from Mr. James Line.[1] The petition is supported by an affidavit from Mr. Line stating that he agreed to make the loan because he was promised an ownership interest in the station after it was granted. The application made no reference to an ownership interest. Mr. Contract, the principal of Cumberland who made the agreement with Mr. Line, denies that any ownership interest was promised. While good cause for the late filing of this petition has not been established, a serious public interest question bearing on the qualifications of Cumberland Broadcasting to be a licensee of the Commission has been raised which cannot be resolved except through a hearing in view of the conflicting statements revealed in the affidavits. Therefore, an appropriate issue will be added.

2. Accordingly, IT IS ORDERED, That the petition to enlarge issues, filed by WIOO, Inc., on November 7, 1972, IS GRANTED and the issues ARE ENLARGED as follows:

To determine whether in filing its original application, Cumberland Broadcasting Company misrepresented the terms and conditions of the loan commitment from Mr. James Line and to determine the effect thereof on Cumberland Broadcasting Company's basic and/or comparative qualifications to be a licensee of the Commission.

[1] The petition was filed on November 7, 1972; Cumberland filed an opposition on November 22, 1972; on November 22, 1972, the Broadcast Bureau filed comments supporting the petition; and a reply was filed by WIOO on December 11, 1972.

3. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence on this issue SHALL BE upon WIOO, Inc., and that the burden of proof SHALL BE upon Cumberland Broadcasting Company.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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